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CC: Capital Habeas Corpus Law Clerks

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRACY DEARL CAIN,)	CASE NO. CV 96-2584 ABC
Petitioner,)	DEATH PENALTY CASE
)	
v.)	
VINCENT CULLEN,* Warden of)	ORDER GRANTING IN PART
California State Prison at San)	AND DENYING IN PART
Quentin,)	MOTION FOR EVIDENTIARY
)	HEARING
Respondent.)	

Petitioner was convicted in 1988 of the burglary, robbery, and first degree murders of his neighbors, William and Modena Galloway. The jury found true special circumstance allegations of burglary-murder, robbery-murder, multiple-murder, and attempted-rape-murder. Petitioner was acquitted on a charge of rape.

The jury sentenced Petitioner to death. After denying the motion for modification of the penalty verdict, the court entered judgment accordingly. The California Supreme Court affirmed Petitioner's conviction and sentence on May 4, 1995. *California v. Cain*, 10 Cal. 4th 1 (1995), *cert. denied*, 516 U.S. 1077 (1996). On July 19, 1995, the California Supreme Court denied his petition for writ of habeas corpus.

* Vincent Cullen is substituted for his predecessors as Warden of California State Prison at San Quentin, pursuant to Federal Rule of Civil Procedure 25(d)(1).

1 Petitioner filed a federal petition for writ of habeas corpus on June 24, 1997.
2 Petitioner was ordered to return to state court to exhaust certain claims. He filed a
3 First Amended Petition containing only unexhausted claims on January 12, 1998,
4 and the federal habeas proceedings were held in abeyance. The California
5 Supreme Court denied relief on the state exhaustion petition on June 28, 2000.

6 Petitioner filed a Second Amended Petition on October 3, 2000. The court
7 granted discovery on limited issues on March 5, 2001 and September 24, 2002.

8 Also on March 5, 2001, Respondent filed a motion to dismiss the Second
9 Amended Petition. The Court denied the motion but required that Claim 10(4) be
10 withdrawn from the Second Amended Petition because it was unexhausted.
11 Petitioner withdrew Claim 10(4) on August 1, 2001.

12 Following the filing of an answer and traverse, on February 7, 2003,
13 Respondent filed a motion for judgment on the pleadings. The next month,
14 Petitioner filed an initial motion for evidentiary hearing. On June 12, 2003, the
15 Court granted judgment on the pleadings in favor of Respondent on Claims 4, 5, 6,
16 7, and 14.

17 On June 19, 2003, Petitioner filed notice with the Court that he had filed a
18 state habeas petition raising claims under *Atkins v. Virginia*, 536 U.S. 304 (2002).
19 The Court stayed the federal proceedings and held them in abeyance pending the
20 state court's resolution of that petition. The California Supreme Court denied the
21 petition on April 22, 2009.

22 The Court lifted the stay of the instant proceedings on April 30, 2009. At
23 that time, the Court denied without prejudice the March 2003 motion for
24 evidentiary hearing. The Court explained that "[a]t the time the motion was filed
25 Petitioner believed that this case was not governed by the Antiterrorism and
26 Effective Death Penalty Act of 1996 ("AEDPA") because it was the date that the
27 request for counsel was filed which determined the applicability of the AEDPA.
28 However, since that time it has become clear that this case is governed by the

1 AEDPA because it is the filing of the petition, not the request for appointment of
 2 counsel, which determines whether a case was pending before the AEDPA
 3 was enacted.” (Minute Order, April 30, 2009, at 2 (citations omitted).)

4 Petitioner filed a Third Amended Petition on June 15, 2009 (“Petition”). He
 5 filed the instant Motion for Evidentiary Hearing on October 23, 2009 (“Motion”).

6 **I. Scope of Motion**

7 Petitioner’s Motion purports to request an evidentiary hearing on a number
 8 of broad issues, listed below. His memorandum discusses and proposes evidence
 9 to be presented in support of only select subclaims within those categories,
 10 however. The claims included in the Motion are as follows:¹

11 (A) “ineffective assistance of counsel at the penalty phase and related
 12 claims (Tenth Claim for Relief; Eleventh Claim for Relief, Subclaims 4-6, 10, 13
 13 and 14).” The Motion presents and proposes evidence regarding each subclaim of
 14 Claim 10 (i.e., Claims 10(1) - 10(18)), but gives no discussion of these subclaims
 15 of Claim 11.

16 (B) “conflict of interest and related claims, including ineffective
 17 assistance and the deprivation of competent expert assistance (Second Claim for
 18 Relief, Subclaim 1; Third Claim for Relief, Subclaim 1; Eleventh Claim for Relief,
 19 Subclaim 11; Thirteenth Claim for Relief).” The Motion presents and proposes
 20 evidence regarding each claim: Claim 2(1), 3(1), 11(11), and 13.

21 (C) “ineffective assistance of counsel at the guilt phase (Second Claim for
 22 Relief).” The Second Claim for relief has 19 subclaims. The Motion presents and
 23 proposes evidence regarding only Claims 2(1), 2(2), 2(7), 2(11), 2(12), 2(13),
 24 2(14), 2(17), and 2(18) of the Petition.

25 (D) “prosecutorial misconduct (First Claim for Relief; Eighth Claim for
 26 Relief, Subclaim 1; Ninth Claim for Relief; Eleventh Claim for Relief, Subclaims

27
 28 ¹ Quotations from Notice of Motion and Motion for Evidentiary Hearing at 1 (citations to Petition pages omitted).

1 2, 4, 7, 8, 17; Fifteenth Claim for Relief, Subclaims 1, 10 and 11; Nineteenth Claim
 2 for Relief, Subclaims 1-4).” The Motion presents and proposes evidence regarding
 3 only Claims 1(1), 1(2), and 1(3).

4 (E) “cumulative error (Eighteenth Claim for Relief).” The Motion
 5 presents and proposes evidence regarding Claim 18.

6 (F) “lethal injection (Eighth Claim, Subclaim 4).” The Motion presents
 7 and proposes evidence regarding Claim 8(4).

8 A request for evidentiary hearing must “include a specification of the factual
 9 issues and the legal reasoning that require a hearing and a summary of the evidence
 10 of each claim the movant proposes to offer at the hearing.” L.R. 83-17.7(g)
 11 (2003). The Court, therefore, addresses only those claims for which Petitioner has
 12 specified the facts and law requiring a hearing and the evidence he would present
 13 at such a hearing.

14 **II. Legal Standard for Evidentiary Hearing**

15 “Prior to the Antiterrorism and Effective Death Penalty Act of 1996
 16 (AEDPA), the decision to grant an evidentiary hearing was generally left to the
 17 sound discretion of district courts. That basic rule has not changed.” *Schriro v.*
 18 *Landrigan*, 550 U.S. 465, 473 (2007) (citations omitted). “Because a federal court
 19 may not independently review the merits of a state court decision without first
 20 applying the AEDPA standards,” however, the court “may not grant an evidentiary
 21 hearing without first determining whether the state court’s decision was an
 22 unreasonable determination of the facts. . . . If, for example, a state court makes
 23 evidentiary findings without holding a hearing . . . such findings clearly result in an
 24 unreasonable determination of the facts.” *Earp v. Ornoski*, 431 F.3d 1158, 1166-
 25 67 (9th Cir. 2005) (internal quotation omitted). Likewise, where “an evidentiary
 26 hearing is needed in order to resolve the[] factual allegations . . . the state court’s
 27 decision was based on an unreasonable determination of the facts.” *Id.* at 1173.

28 An evidentiary hearing is required if the petitioner “establishes a colorable

1 claim for relief and has never been afforded a state or federal hearing on this claim
2 In showing a colorable claim, a petitioner is required to allege specific facts
3 which, if true, would entitle him to relief.” *Id.* at 1167, 1167 n.4 (internal citation
4 omitted); *see also Alberni v. McDaniel*, 458 F.3d 860, 873 (9th Cir. 2006) (holding
5 petitioner “is entitled to an evidentiary hearing if he (1) alleges facts, which, if
6 proven, would entitle him to relief; and (2) show[s] that he did not receive a full
7 and fair hearing in state court either at trial or in a collateral proceeding”).

8 Under the habeas statute as amended by AEDPA, “[i]f the applicant has
9 failed to develop the factual basis of a claim in State court proceedings, the court
10 shall not hold an evidentiary hearing on the claim” unless certain narrow
11 circumstances apply. 28 U.S.C. § 2254(e)(2); *Williams (Michael) v. Taylor*, 529
12 U.S. 420, 429-30 (2000). A finding that the petitioner failed to develop the factual
13 basis of a claim requires a showing of “lack of diligence, or some greater fault,
14 attributable to” the petitioner or his counsel. *Williams (Michael)*, 529 U.S. at 432;
15 *accord Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (holding that
16 “petitioner is barred from having an evidentiary hearing under § 2254(e)(2) when
17 petitioner did not exercise diligence in developing facts in the relevant state court
18 proceedings”). Thus, if a petitioner properly presented the factual basis for his
19 claim to the state court but was denied a hearing, the AEDPA does not bar an
20 evidentiary hearing in federal court. *See Williams (Michael)*, 529 U.S. at 440-44.
21 If, as here, “the California Supreme Court summarily denied [the] state habeas
22 petition without ordering formal pleadings,” the petitioner would “never reach[]
23 the stage of the proceedings at which an evidentiary hearing should be requested.”
24 *Horton v. Mayle*, 408 F.3d 570, 582 n.6 (9th Cir. 2005); *California v. Romero*, 8
25 Cal. 4th 728, 737-40 (1994) (summarizing the California procedures for habeas
26 petitions). Petitioner has not, therefore, shown any lack of diligence. *See Horton*
27 *v. Mayle*, 408 F.3d at 582 n.6.

28 To obtain relief on a claim, the petitioner must establish that the state court’s

1 denial of the claim “was contrary to, or involved an unreasonable application of,
 2 clearly established Federal law, as determined by the Supreme Court of the United
 3 States,” or “was based on an unreasonable determination of the facts in light of the
 4 evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d); *see also*
 5 *Harrington v. Richter*, 131 S. Ct. 770, 783-84 (2011). A state court decision is
 6 “contrary to” federal law “if the state court applies a rule that contradicts the
 7 governing law set forth in [Supreme Court] cases” or “if the state court confronts
 8 facts that are materially indistinguishable from a relevant Supreme Court precedent
 9 and arrives at a result opposite to” that reached by the Supreme Court. *Williams*
 10 *(Terry) v. Taylor*, 529 U.S. 362, 405-06 (2000).

11 A decision is an “unreasonable application” of federal law if the state court
 12 “correctly identifies the governing legal rule but applies it unreasonably to the facts
 13 of a particular prisoner’s case,” or “either unreasonably extends a legal principle
 14 from [Supreme Court] precedent to a new context where it should not apply or
 15 unreasonably refuses to extend that principle to a new context where it should
 16 apply.” *Id.* at 407-08. For the court’s application of Supreme Court precedent to
 17 be “unreasonable,” the decision “must have been more than incorrect or erroneous .
 18 . . . ; [it] must have been ‘objectively unreasonable.’” *Wiggins v. Smith*, 539 U.S.
 19 510, 520-21 (2003) (quoting *Williams (Terry)*, 529 U.S. at 409).

20 Here, the California Supreme Court summarily denied Petitioner’s state
 21 habeas claims. Thus:

22 [w]here a state court’s decision is unaccompanied by an
 23 explanation, the habeas petitioner’s burden . . . must be
 24 met by showing there was no reasonable basis for the
 25 state court to deny relief. This is so whether or not the
 26 state court reveals which of the elements in a multipart
 claim it found insufficient

27 Under § 2254(d), a habeas court must determine what
 28 arguments or theories supported or, as here, could have
 supported, the state court’s decision; and then it must ask

1 whether it is possible fairminded jurists could disagree
2 that those arguments or theories are inconsistent with the
3 holding in a prior decision of this Court.

4 *Richter*, 131 S. Ct. at 784, 786. “A state court’s determination that a claim lacks
5 merit precludes federal habeas relief so long as fairminded jurists could disagree on
6 the correctness of the state court’s decision.” *Id.* at 786 (internal quotation and
7 citation omitted).

8 “In deciding whether to grant a hearing, a federal court must consider
9 whether such a hearing could enable an applicant to prove the petition’s factual
10 allegations” meriting relief. *Schriro*, 550 U.S. at 474 (citations omitted). “Because
11 the deferential standards prescribed by § 2254 control whether to grant habeas
12 relief, a federal court must take into account those standards in deciding whether an
13 evidentiary hearing is appropriate.” *Id.*

14 **III. Legal Standard for Ineffective Assistance of Counsel**

15 To establish ineffective assistance of counsel, Petitioner must demonstrate
16 that (1) counsel’s performance was deficient and (2) the deficient performance
17 prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

18 Counsel’s representation is deficient if, “considering all the circumstances,”
19 it “fell below an objective standard of reasonableness” and was unreasonable
20 “under prevailing professional norms.” *Id.* at 688. “Judicial scrutiny of counsel’s
21 performance must be highly deferential. . . . A fair assessment of attorney
22 performance requires that every effort be made to eliminate the distorting effects of
23 hindsight.” *Id.* at 689. The Court “must indulge a strong presumption that
24 counsel’s conduct falls within the wide range of professional assistance; that is, the
25 defendant must overcome the presumption that, under the circumstances, the
26 challenged action might be considered sound trial strategy.” *Id.* (internal quotation
27 omitted).

28 To establish that counsel’s deficient performance prejudiced the defense,
Petitioner must show “that there is a reasonable probability that, but for counsel’s

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686.

As the Supreme Court emphasized in *Richter*:

[s]urmounting *Strickland*’s high bar is never an easy task. . . . Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel’s assistance after conviction or adverse sentence. The question is whether an attorney’s representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.

Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.

Richter, 131 S. Ct. at 788 (internal quotations and citations omitted).

IV. Claims 1(1) and 1(3), and Claims 2(12), 10(6), and 10(13) as to Mendoza

1 First, Petitioner alleges that the prosecution failed to provide to the defense
 2 (Claim 1(1)) and failed to preserve (Claim 1(3)) evidence of the personal
 3 involvement of “the prosecution’s primary guilt phase witness,” Uly Mendoza, in
 4 violation of Petitioner’s right to due process. (Pet. at 141 ¶ 343, 148.)² In Claims
 5 2(12), 10(6), and 10(13)³, Petitioner alleges, *inter alia*, that trial counsel provided
 6 ineffective assistance by failing to “present substantial additional evidence . . .
 7 [regarding] the lack of credibility of Mendoza.” (*Id.* at 179 ¶ 465; *see also id.* at
 8 233 ¶ 624.) Mendoza was, among other things, present at a party at Petitioner’s
 9 house on the night of the murders. *See Cain*, 10 Cal. 4th at 19-24; (*see also, e.g.*,
 10 20 RT 5466-67; Pet. Ex. 177 at 00512-18). Petitioner argues that counsel should
 11 have further attacked the credibility of Mendoza’s testimony that Petitioner was
 12 solely responsible for the crimes and expressed no remorse for them. (*Id.* at 179
 13 ¶ 465, 233 ¶ 624.)

14 Specifically, Petitioner alleges that the prosecution (a) failed to preserve
 15 evidence regarding Floyd Clements’ and Kathy Lazoff’s statements to police that
 16

17 ² Claim 1(3) involves the same factual allegations at issue in Claim 1(1). (*See* Mot. at 82 (stating,
 18 as to claim that law enforcement failed to investigate Mendoza’s involvement, that “[t]he factual
 19 disputes at issue in this claim are set forth above and a hearing is requested in relation to that
 20 subclaim [1(1)].”)) While Petitioner’s Motion “does not request an additional hearing on these
 facts,” Claim 1(3) may be decided on the same basis as Claim 1(1). (*Id.*)

21 ³ In Claim 10(13), Petitioner alleges trial counsel failed to present evidence in the penalty phase
 22 of trial to support a “lingering doubt” factor in mitigation. (Pet. at 237-38 ¶ 637; Mot. at 47.)
 23 Petitioner fails to specify what evidence trial counsel failed to present. *See* Habeas Corpus R.
 24 2(c)(1)-(2) (requiring petitioner to specify all grounds for relief and supporting facts); L.R. 83-
 25 17.7(g) (2003) (“Any request for evidentiary hearing . . . shall include a specification of the
 26 factual issues and the legal reasoning that require a hearing”); *Ortiz v. Stewart*, 149 F.3d 923, 934
 27 (9th Cir. 1998) (upholding denial of evidentiary hearing on ineffective assistance of counsel claim
 28 where petitioner failed “to allege specific facts which, if true, would entitle him to relief” (internal
 quotation and citation omitted)). He indicates in his Motion, however, that at an evidentiary
 hearing he would present the evidence identified in support of Claim 2(12), regarding Mendoza’s
 credibility, the bloody footprints, David Cerda’s presence in the Galloways’ house, and
 Petitioner’s leadership capacity. (*See infra* pp. 58-64; Mot. at 47; Pet. at 179 ¶ 465.)
 Accordingly, to the extent that the Court finds any portion of Claim 2(12) to be appropriate for an
 evidentiary hearing, the Court will also consider the issue in connection with Claim 10(13).

1 Mendoza asked them to lie to create an alibi for the night of the crimes, because
 2 law enforcement agents told them they were not interested in such evidence; (b)
 3 failed to “undertake any efforts to search the home of Mendoza in order to locate
 4 and potentially preserve evidence of the crimes,” including “the jewelry box which
 5 was stolen from the crime scene, but was not found either in the drainage ditch or
 6 the residence of Mr. Cain or Cerda, and which Mendoza was reported by witnesses
 7 as having attempted to sell after the crime;” (c) failed to inform the defense that
 8 Mendoza “had received a deal in exchange for his testimony against Mr. Cain;”
 9 and (d) failed to disclose Mendoza’s criminal history. (Pet. at 142-43 ¶ 346, Mot.
 10 at 80.)

11 In a declaration offered in support of the Petition, Clements states, “The DA
 12 would turn off the tape recorder when they did not want to hear what I had to say.
 13 For example, whenever I mentioned Uly [Mendoza]’s name they would turn off the
 14 recorder. They said that they were not interested in what Uly told me.” (Pet. Ex.
 15 162 ¶ 13.) Lazoff states that the police spoke with her before trial, and did not
 16 question her further when she recanted her alibi and told them that Mendoza asked
 17 her to say he was with her. (Pet. Ex. 165 at 2.)

18 The Court granted discovery on Petitioner’s allegations of prosecutorial
 19 misconduct. (Order re Pet’r’s Outstanding Discovery Requests, Sept. 24, 2002, at
 20 5-7.)

21 **A. Legal Standard re Failure to Disclose, Collect, or Preserve**
 22 **Evidence**

23 **1. Disclosure**

24 As to evidence in the prosecution’s possession, “the suppression by the
 25 prosecution of evidence favorable to an accused upon request violates due process
 26 where the evidence is material either to guilt or to punishment, irrespective of the
 27 good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87
 28 (1963). Even when no request has been made, the prosecution must provide

1 defense counsel with exculpatory evidence if it is “material[, i.e.,] . . . if the
 2 omitted evidence creates a reasonable doubt that did not otherwise exist”
 3 *United States v. Agurs*, 427 U.S. 97, 112 (1976). Materiality requires “a
 4 reasonable probability that, had the evidence been disclosed to the defense, the
 5 result of the proceeding would have been different. A ‘reasonable probability’ is a
 6 probability sufficient to undermine confidence in the outcome.” *United States v.*
 7 *Bagley*, 473 U.S. 667, 682 (1985).

8 **2. Collection and Preservation**

9 **a. Generally**

10 To establish a due process violation in the prosecution’s failure to collect or
 11 preserve potentially exculpatory evidence, by contrast, the defendant must
 12 demonstrate bad faith. *See Miller v. Vasquez*, 868 F.2d 1116, 1120-21 (9th Cir.
 13 1989); *see also Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (“unless a criminal
 14 defendant can show bad faith on the part of the police, failure to preserve
 15 potentially useful evidence does not constitute a denial of due process of law”). In
 16 addition:

17 [w]hatever duty the Constitution imposes on the States to
 18 preserve evidence, that duty must be limited to evidence
 19 that might be expected to play a significant role in the
 20 suspect’s defense. To meet this standard of constitutional
 21 materiality, evidence must both possess an exculpatory
 22 value that was apparent before the evidence was
 23 destroyed, and be of such a nature that the defendant
 would be unable to obtain comparable evidence by other
 reasonably available means.

24 *California v. Trombetta*, 467 U.S. 479, 488-89 (1984); *see also United States v.*
 25 *Martinez-Martinez*, 369 F.3d 1076, 1086-87 (9th Cir. 2004) (applying *Trombetta*
 26 standard of materiality to claim of failure to collect evidence).

27 **b. Comparable Evidence**

28 In *Trombetta*, defendants accused of driving under the influence claimed

1 California's failure to preserve their breath samples denied them access to
2 exculpatory evidence in violation of the Due Process Clause. 467 U.S. at 481. The
3 Court found no due process violation because, among other reasons, the failure to
4 preserve breath samples did not leave defendants "without alternative means of
5 demonstrating their innocence." *Id.* at 490. For example, defendants could
6 challenge the breath test results by inspecting the breath analysis machine for
7 faulty calibration, reviewing weekly calibration results, demonstrating that the
8 defendant was dieting at the time of the test or the test was conducted near a source
9 of radio waves, and cross-examining the officer who administered the test for
10 operator error. *Id.*

11 Interpreting *Trombetta*, the Sixth Circuit reasoned that a defendant's due
12 process rights are not violated simply because the best available tool for raising
13 doubts in the mind of the fact-finder is destroyed. *See Elmore v. Foltz*, 768 F.2d
14 773, 778 (6th Cir. 1985) (finding no *Trombetta* violation in destruction of
15 audiotape from police informant's "wire" during alleged drug sale). "Under
16 *Trombetta*, [] all that matters is that some reasonable alternative means exists for
17 attempting to do what one would have attempted to do with the destroyed
18 evidence. [Defendant] might have cast aspersions upon [the informant's]
19 reliability in any number of ways; the tapes were not indispensable to that effort."
20 *Id.* at 778; *see also Kordenbrock v. Scroggy*, 919 F.2d 1091, 1103 (6th Cir. 1990)
21 (holding capital habeas petitioner "was not prevented from presenting his defense
22 of diminished capacity because the police failed to preserve and test" drugs
23 contained in a bottle in front of petitioner during police interrogation, and therefore
24 failed to meet *Trombetta* standard).

25
26 Similarly, the First Circuit rejected a petitioner's argument that the destroyed
27 evidence was irreplaceable because cross-examining the police and the source of
28 the evidence forced him "to try to prove his case through impeachment of a

1 damaging, hostile witness.” *Olszewski v. Spencer*, 466 F.3d 47, 59 (1st Cir. 2006)
2 (internal quotation omitted). The court noted that “*Trombetta* itself involved the
3 need to recreate the evidence through hostile witnesses, but there is no suggestion
4 that this is insufficient.” *Id.*; see also *United States v. Donaldson*, 915 F.2d 612,
5 614 (10th Cir. 1990) (holding, where weight of seized marijuana was at issue, that
6 submitting affidavits and cross-examining government witnesses regarding weight
7 was comparable evidence to weighing the marijuana itself).

8 The Ninth Circuit found a *Trombetta* violation in *United States v. Cooper*,
9 983 F.2d 928, 931-32 (1993), where police destroyed machinery alleged to
10 manufacture methamphetamine and defendants had no other means of showing it
11 had not been altered from its design, incapable of making methamphetamine, more
12 than twenty-five years prior. By contrast, the Circuit has repeatedly found no
13 *Trombetta* violation where other means of demonstrating the contents of the
14 incriminating evidence are available. See *United States v. Drake*, 543 F.3d 1080,
15 1090 (9th Cir. 2008) (holding fourteen still images of a robbery and officers’
16 testimony about contents of surveillance video were comparable evidence to the
17 video itself); *Featherstone v. Estelle*, 948 F.2d 1497, 1505 (9th Cir. 1991)
18 (holding, where petitioner argued police photo lineup was inherently suggestive,
19 that defense counsel’s in-court photo lineup impeaching the prior results was
20 comparable evidence to the destroyed, actual photo used in the original line up);
21 *United States v. Sherlock*, 962 F.2d 1349, 1355 (9th Cir. 1989) (holding, in
22 prosecution for rape, that testimony of examining physician that fluid samples from
23 vaginal cavities of alleged victims showed no sperm was alternative, potentially
24 exculpatory evidence for lost rape kit); *United States v. Alderdyce*, 787 F.2d 1365,
25 1370-71 (9th Cir. 1986) (holding that lack of vaginal swabs did not “completely
26 deprive[] [rape defendant] of potentially exculpatory evidence” in violation of
27 *Trombetta*, because defendant had access to sperm samples found on victim’s
28 clothing, results of tests done on those samples, and results from pap smear

1 indicating presence of sperm); *United States v. Dela Espriella*, 781 F.2d 1432,
 2 1437-38 (9th Cir. 1986) (finding no *Trombetta* violation where defendant had
 3 opportunity to challenge the reliability of narcotics-sniffing dogs said to have
 4 detected cocaine on his money, even though money itself was not preserved for
 5 examination).

6 **B. Analysis**

7 **1. Claims 1(1) and 1(3) regarding Clements and Lazoff, Stolen** 8 **Items, and Inducement for Testimony**

9 **a. Statements by Clements and Lazoff**

10 As to Petitioner's allegation that the police, in bad faith, failed to collect or
 11 preserve statements by Clements or Lazoff, that evidence was not "of such a nature
 12 that the defendant would be unable to obtain comparable evidence by other
 13 reasonably available means." *Trombetta*, 467 U.S. at 489. Clements and Lazoff
 14 testified at trial, and the defense could have interviewed them about any alibis
 15 Mendoza sought from them and any other topics police allegedly failed to
 16 investigate. The California Supreme Court's rejection of the claim on that basis
 17 would not be an unreasonable application of Supreme Court precedent.

18 **b. Stolen Items at Mendoza's Home**

19 The California Supreme Court likewise could have reasonably determined
 20 that Petitioner failed to demonstrate that comparable evidence of any stolen items
 21 that may have been at Mendoza's home was unavailable to the defense by other
 22 reasonably available means. *See Trombetta*, 467 U.S. at 489. Witnesses Willis
 23 and Sampson, for example, testified at trial that Mendoza possessed items
 24 matching those that were stolen, including a VCR and the jewelry box with
 25 necklaces and women's rings. (21 RT 5628, 5747-48, 5753-54, 5774-75; *cf.* 19 RT
 26 at 5328-30 (testimony of Kenneth Mehaffie describing small, wooden jewelry box
 27 with jewelry missing from the Galloways' house).) Witness Greene also testified
 28 at trial that Mendoza told her he took a VCR. (22 RT 5931.) The prosecutor even

1 acknowledged in his closing argument that witnesses testified that Mendoza was
 2 selling a VCR and “the jewelry.” (23 RT 6080-81.) The California Supreme Court
 3 could have reasonably determined that the witnesses’ testimony about Mendoza’s
 4 possession of stolen items was evidence comparable to the recovery of such items
 5 at his house. *See, e.g., Drake*, 543 F.3d at 1090; *Sherlock*, 962 F.2d at 1355. The
 6 court’s denial of this claim was not, therefore, an unreasonable application of
 7 Supreme Court precedent.

8 **c. Inducement for Mendoza’s Testimony**

9 The state high court may have reasonably concluded that Petitioner’s
 10 allegations that Mendoza received an undisclosed inducement for his testimony are
 11 speculative. *See Phillips v. Woodford*, 267 F.3d 966, 986-87 (9th Cir. 2001)
 12 (holding petitioner’s *Brady* claims were “without merit” because they were “mere
 13 suppositions,” and petitioner was “not entitled to a hearing to pursue them
 14 further”). The only evidence Petitioner offers in support of his claim is (1) a
 15 statement by Lazoff that “[i]t always seemed to me that the reason Tony
 16 [Mendoza] was not charged with being involved in the Galloway murder case was
 17 because he was granted immunity by the District Attorney. I don’t remember if
 18 Tony told me that or if I heard it from someone else” (Pet. Ex. 165 at 2); and (2) a
 19 statement by Clements that “[m]any of us suspected that Uly made a deal with the
 20 DA” because he did not go to jail on several pending cases and he bought a new
 21 truck although he had no money. (Pet. Ex. 162 ¶ 16.) The California Supreme
 22 Court may have reasonably concluded that each witness’s conclusion is speculative
 23 on its face. *See Phillips v. Woodford*, 267 F.3d at 986-87. Because the court’s
 24 denial of this claim was not unreasonable, Petitioner is not entitled to federal
 25 habeas relief on the claim.

26 **2. Claims 2(12), 10(6), and 10(13) regarding Clements and** 27 **Lazoff, Stolen Items, Inducement for Testimony**

28 Petitioner alleges that trial counsel provided ineffective assistance at the

1 guilt phase (Claim 2(12)) and at the penalty phase (Claims 10(6), 10(13)) of trial
 2 by failing to “present substantial additional evidence . . . [regarding] the lack of
 3 credibility of Mendoza.” (Pet. at 179 ¶ 465, 233 ¶ 624; Mot. at 21-22, 70-71.)
 4 Petitioner refers generally to the same evidence discussed above (Mot. at 71 (citing
 5 Mot. at 77-92)), regarding the statements by Clements and Lazoff, potential
 6 evidence at Mendoza’s home, the alleged inducement for Mendoza’s testimony,
 7 and Mendoza’s prior criminal history.

8 **a. Statements by Clements and Lazoff**

9 Petitioner submits declarations from Clements and Lazoff that Mendoza
 10 asked them to provide an alibi for him for Friday and, apparently, Saturday nights,
 11 respectively. (Pet. Ex. 162 ¶¶ 8-9; Pet. Ex. 165 ¶ 10.) Clements and Lazoff
 12 testified at trial, and defense counsel did not ask the witnesses if Mendoza sought
 13 an alibi from them. Petitioner contends that this alleged information would have
 14 cast doubt upon the credibility of Mendoza’s trial testimony against Petitioner.

15 Because an evidentiary hearing is necessary to determine whether trial
 16 counsel adequately investigated and presented any information about Mendoza’s
 17 alleged attempts to create an alibi from Clements and Lazoff, and to evaluate the
 18 nature and weight of any such testimony they could have provided, the California
 19 Supreme Court’s decision summarily rejecting this claim was based on an
 20 unreasonable determination of the facts. *See Earp*, 431 F.3d at 1173 (“Because an
 21 evidentiary hearing is needed in order to resolve these factual allegations we hold
 22 that the state court’s decision was based on an unreasonable determination of the
 23 facts”). Accordingly, this portion of Claims 2(12), 10(6), and 10(13) will be
 24 included within the scope of the evidentiary hearing.

25 //

26 **b. Stolen Items at Mendoza’s Home**

27 Trial counsel could not have been ineffective for failing to present certain
 28 evidence of stolen items at Mendoza’s home that he could not reasonably have

1 possessed. As discussed above, significant evidence of Mendoza's possession of
 2 the stolen items obtained from other reasonably available means was presented at
 3 trial. The California Supreme Court would not have been unreasonable in
 4 determining that trial counsel was not ineffective on this basis.

5 **c. Inducement for Mendoza's Testimony**

6 As the Court held above, the state high court could have reasonably
 7 concluded that Petitioner's allegations that Mendoza received an undisclosed
 8 inducement for his testimony are speculative. The court may have reasonably
 9 determined that it is not reasonable that counsel would have succeeded in
 10 introducing Clements' or Lazoff's speculative testimony at trial. *Cf. Wilson v.*
 11 *Henry*, 185 F.3d 986, 990 (9th Cir. 1999) ("To show prejudice under *Strickland*
 12 from failure to file a motion," petitioner must show, in part, that "had his counsel
 13 filed the motion, it is reasonable that the trial court would have granted it as
 14 meritorious"). If a witness "has no relevant personal knowledge . . . of a reason
 15 that a witness may be lying or mistaken, he might have no relevant testimony to
 16 provide. No witness may give testimony based on conjecture or speculation."
 17 *California v. Chatman*, 38 Cal. 4th 344, 382 (2006). The trial court "has no
 18 discretion to admit irrelevant evidence. Speculative inferences . . . cannot be
 19 deemed to be relevant to establish the speculatively inferred fact" *California*
 20 *v. Babbitt*, 45 Cal. 3d 660, 681 (1988).

21 Petitioner cannot have been denied any constitutional rights or suffered any
 22 prejudice where he "claims a right the law simply does not recognize," *Lockhart v.*
 23 *Fretwell*, 506 U.S. 364, 370 (1993) (internal quotation omitted), such as the
 24 introduction of speculative testimony. The California Supreme Court's denial of
 25 Petitioner's claim of ineffective assistance on this basis, therefore, was not
 26 unreasonable.

27 **3. Claims 1(1), 2(12), 10(6), 10(9), and 10(13) regarding** 28 **Mendoza's Criminal History**

Petitioner alleges that the prosecution violated *Brady* by failing to disclose Mendoza's "criminal activity prior to and after the crimes against the Galloways," including "drug sales, burglary of a residence, theft and assaults." (Mot. at 80; *see also* Pet. at 143 ¶ 346 (d).) In support, Petitioner cites "criminal history information regarding Mendoza . . . available publicly" as well as statements by Clements and Lazoff. (Mot. at 80 (citing Pet. Ex. 196); *see also* Pet. at 143 ¶ 346 (d) (citing Pet. Exs. 162, 165).) Petitioner also contends that trial counsel was ineffective for failing to investigate and present evidence of Mendoza's criminal history. (Pet. at 179 ¶ 465, 233 ¶ 624; Mot. at 21-22, 24-26, 70-71.)

Clements states in his declaration that Mendoza "had several pending cases" in or before 1987. (Pet. Ex. 162 ¶ 16.) Lazoff declares that Mendoza "was in jail for three or four weeks a few months before the Galloway murders. He told me that he was only in jail for traffic warrants, but he was probably lying about that." (Pet. Ex. 165 ¶ 11.) Finally, a probation officer's report on Mendoza's criminal history shows incidents that occurred before his testimony at Petitioner's trial in April 1988. (*See* Pet. Ex. 196 at VENT 19774.) The report includes a juvenile misdemeanor adjudication of grand theft committed in September 1983 and an adult misdemeanor conviction of reckless driving committed in August 1987. (*Id.*)⁴

⁴ The criminal history report also includes two instances on which Mendoza was released pursuant to California Penal Code § 849(b)(1), which provides that a "peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever [h]e or she is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested." Since "evidence of mere arrests is inadmissible [as to a witness's credibility] because it is more prejudicial than probative," *California v. Lopez*, 129 Cal. App. 4th 1508, 1523 (2005), the arrests themselves could not have been used to impeach Mendoza.

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The Court need not and does not now decide whether the arrest records could constitute a part of Petitioner's *Brady* claim. "There is no uniform approach in the federal courts to the treatment of inadmissible evidence as the basis for *Brady* claims. . . . It appears that our Circuit's law on this issue is not entirely consistent." *Paradis v. Arave*, 240 F.3d 1169, 1178-79 (9th Cir.

1 Evidence of the conduct underlying the juvenile adjudication might have
 2 been admissible to impeach Mendoza if the conduct evinced moral turpitude and if
 3 Mendoza's discharge from the Youthful Offender Parole Board was not an
 4 honorable discharge. *See California v. Lee*, 28 Cal. App. 4th 1724, 1739-40 (1994)
 5 (holding that such conduct may be used for impeachment "at least" in cases where
 6 the juvenile did not receive an honorable discharge). Mendoza's adjudication of
 7 grand theft would have involved moral turpitude. *California v. Wheeler*, 4 Cal. 4th
 8 284, 297 (1992) (agreeing with trial court that misdemeanor grand theft was "an
 9 offense necessarily involving both moral turpitude and dishonesty"). Moreover,
 10 Mendoza appears to have twice violated his probation (Pet. Ex. 196 at VENT
 11 19774 (noting "2 VOPs")), although it was "successfully term[inated]." (*Id.*) The
 12 record does not indicate whether Mendoza was honorably discharged.

13 Evidence of the conduct underlying the adult misdemeanor conviction of
 14 reckless driving might also have been admissible for impeachment. *Wheeler*, 4
 15 Cal. 4th at 295 ("[I]n proper cases, nonfelony conduct involving moral turpitude
 16 should be admissible to impeach a criminal witness"). Whether Mendoza's
 17 reckless driving involved moral turpitude is a fact-dependent question. *Cf. Padilla*
 18 *v. Kentucky*, __ U.S. __, 130 S. Ct. 1473, 1489 (2010) (Scalia, J., dissenting)
 19 (observing, in deportation context, that "[d]etermining whether a particular crime is
 20 one involving moral turpitude is no[t] eas[y]," and citing ABA guideline that
 21 misdemeanor DUI "generally" does not involve moral turpitude, but "may" do so
 22 if it results in injury or if the driver knew his license had been suspended or
 23 revoked); *Marmolejo-Campos v. Gonzales*, 503 F.3d 922, 926 (9th Cir. 2007)
 24 (citing with approval decisions that "criminally reckless conduct" and "reckless
 25 conduct endangering the safety of others can be a crime of moral turpitude");

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 28 _____
 2001) (gathering cases and holding that the "instant case does not require resolution of that
 possible conflict"); *United States v. Price*, 566 F.3d 900, 911-12 (9th Cir. 2009) (same).

1 *compare California v. Coad*, 181 Cal. App. 3d 1094, 1109 (1986) (citing with
2 approval federal district court decision that reckless driving does not involve moral
3 turpitude); *In re Kelly*, 52 Cal. 3d 487, 494 (1990) (holding, in attorney discipline
4 matter, that DUI does not involve moral turpitude). Mendoza's probation report
5 indicates only that he "took a tarp cover and a stereo speaker from a pick up truck
6 parked in a shopping center. He told police he did it because the truck looked
7 similar to one whose owner had stolen some property from a friend's vehicle."
8 (Pet. Ex. 196 at VENT 19774.) The record thus far developed does not resolve the
9 issue of moral turpitude.

10 The prosecution must disclose material impeachment evidence concerning
11 its witnesses, regardless of whether defense counsel requested that information.
12 *See Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (discussing *United States v. Bagley*,
13 473 U.S. 667 (1985)). The prosecutor "has a duty to learn of any favorable
14 evidence known to the others acting on the government's behalf in the case,
15 including the police." *Kyles*, 514 U.S. at 437. That duty extends to the criminal
16 histories of government witnesses. *See Price*, 566 F.3d at 903 (finding *Brady*
17 violation where prosecutor failed to learn of and disclose material evidence of
18 government witness's criminal history that lead investigating officer likely
19 possessed); *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997).

20 In *Carriger*, the Ninth Circuit considered a *Brady* claim based upon the
21 criminal history of the prosecution's key witness, who was "known by police and
22 prosecutors to be a career burglar and six-time felon, with a criminal record going
23 back to adolescence." 132 F.3d at 480. The court held:

24 When the state decides to rely on the testimony of such a
25 witness, it is the state's obligation to turn over all
26 information bearing on that witness's credibility. This
27 must include the witness's criminal record, including
28 prison records, and any information therein which bears
on credibility. The state had an obligation, before putting
[the witness] on the stand, to obtain and review [his]

1 corrections file, and to treat its contents in accordance
2 with the requirements of *Brady* and *Giglio*.

3 To the extent defense counsel's failure to request the file
4 was a cause of the state's failure to disclose it, that failure
5 constituted clear ineffective assistance of counsel. Either
6 way, [petitioner] was denied a fair trial. We do not
7 independently consider the ineffective assistance of
8 counsel issue because the Supreme Court has clarified
9 that the state's *Brady* obligations do not depend upon the
10 defense's discovery requests.

11 *Id.* (citations omitted).

12 The record does not indicate what information, if any, the prosecution
13 divulged about Mendoza's criminal history or what representations it made to trial
14 counsel. The record is also silent about what requests, if any, trial counsel made
15 for Mendoza's criminal background information and to what extent he may have
16 been aware of it.

17 An evidentiary hearing is needed to resolve these fact-dependent issues. *See*
18 *Earp*, 431 F.3d at 1173, 1176. Accordingly, the Court will include within the
19 scope of the evidentiary hearing Claims 1(1), 2(12), 10(6), 10(9), and 10(13) as to
20 Mendoza's criminal history.

21 **V. Claim 1(2) as to Mendoza**

22 In Claim 1(2), Petitioner alleges, *inter alia*, that the prosecutor:

23 committed misconduct when he allowed Mendoza to
24 falsely testify that he had no involvement in the crimes at
25 the Galloway residence, and failed to correct that false
26 testimony; when he allowed Mendoza to deny receiving
27 any deal in exchange for his testimony against Mr. Cain;
28 and when he repeatedly argued to the jury in his closing
argument that it should believe Mendoza's testimony
implicating Mr. Cain, when he knew Mendoza's
testimony to be false and misleading in many material
aspects.

1 (Pet. at 146 ¶ 352; *see also* Pet. at 143-44 ¶ 346(d).) At trial, Mendoza testified on
 2 direct examination that he had never “been charged with any crime in this case”
 3 and had never “go[ne] into the Galloway[s’] house.” (20 RT 5502.)

4 “[A] conviction obtained through use of false evidence, known to be such by
 5 representatives of the State, must fall under the Fourteenth Amendment.” *Napue v.*
 6 *Illinois*, 360 U.S. 264, 269 (1959) (citing, *inter alia*, *Mooney v. Holohan*, 294 U.S.
 7 103 (1935)). “To prevail on a claim based on *Mooney-Napue*, the petitioner must
 8 show that (1) the testimony (or evidence) was actually false, (2) the prosecution
 9 knew or should have known that the testimony was actually false, and (3) [] the
 10 false testimony was material.” *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th
 11 Cir. 2003). The burden of demonstrating falsity rests on petitioner. *See id.*
 12 (denying relief where petitioner’s evidence of falsity was “unreliable” and “failed
 13 to demonstrate that the testimony [at issue] was false”).

14 First, as discussed above (*supra* p. 15), the court could have reasonably
 15 determined that Petitioner failed to demonstrate that Mendoza received an
 16 undisclosed inducement for his testimony. The court could have reasonably found
 17 Petitioner’s allegations that Mendoza received such an inducement to be purely
 18 speculative. *See Phillips v. Woodford*, 267 F.3d at 986-87. The court, therefore,
 19 could have reasonably held that Petitioner did not meet his burden of
 20 demonstrating falsity with such allegations.

21 Beyond that claim, the court would not have been unreasonable in
 22 concluding that Petitioner failed to establish that any of Mendoza’s testimony was
 23 “actually false.” *Zuno-Arce*, 339 F.3d at 889. The entirety of the evidence
 24 Petitioner points to as “contradict[ing]” Mendoza’s testimony consists of testimony
 25 from other witnesses. (Pet. at 60-63 ¶ 110.) “A challenge to evidence through
 26 another witness,” or “[m]ere inconsistency between witnesses’ testimony . . . is
 27 insufficient to establish prosecutorial use of false testimony.” *United States v.*
 28 *Martin (Sidney)*, 59 F.3d 767, 770 (8th Cir. 1995) (internal quotation omitted); *see*

1 *also United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992) (denying *Napue*
 2 claim where the “only showing made by [petitioner] is that [the witness’s]
 3 statement may have been contradicted by another witness”); *United States v.*
 4 *Brown*, 634 F.2d 819, 827 (5th Cir. 1981) (“[D]ue process is not implicated by the
 5 prosecution’s introduction or allowance of false or perjured testimony unless the
 6 prosecution actually knows or believes the testimony to be false or perjured; it is
 7 not enough that the testimony is challenged by another witness”). The prosecutor
 8 acknowledged in his closing statement that “if you believe the other witness, you
 9 can’t believe Ulie Mendoza’s testimony when he says he didn’t go in the house”
 10 Saturday morning. (23 RT 6081.) The only physical evidence that could have
 11 placed Mendoza inside the house, which the prosecution investigated, was
 12 determined to eliminate Mendoza as a source. (*See* 20 RT 5425, 5436, 5575-76);
 13 *cf. Morris v. Ylst*, 447 F.3d 735, 744 (9th Cir. 2006) (holding prosecution has a
 14 duty to investigate suspected perjury; “[i]f the state had conducted an investigation
 15 and formed a good-faith belief that [there was no falsity presented at trial] . . . there
 16 would have been . . . no duty under *Mooney* and *Napue*).

17 Accordingly, the California Supreme Court’s denial of Claim 1(2) as to
 18 Mendoza was not unreasonable. Claim 1(2) is, therefore, denied as to Mendoza.

19 **VI. Claim 1(2) as to Testimony of Investigator David Stone, Kenneth**
 20 **Mehaffie, and Officer Dwight Holmbom**

21 In portion of Claim 1(2), Petitioner alleges the prosecutor committed
 22 misconduct in presenting false testimony from Investigator David Stone, Kenneth
 23 Mehaffie, and Officer Dwight Holmbom.

24 //

25 **A. Investigator David Stone**

26 **1. Allegations and Background**

27 Petitioner alleges that the prosecutor presented false testimony from District
 28 Attorney Investigator David Stone to impeach defense witness Floyd Clements.

(Pet. at 84-85 ¶¶ 161-66; Mot. at 85.) Petitioner claims that after Clements “testified in a manner that contradicted Mendoza’s claims about what occurred on the night of the crime, the prosecutor called Stone, who testified that Clements had previously given him a statement which contradicted his testimony and supported Mendoza’s claims regarding the crimes.” (Mot. at 85.) Petitioner alleges that Stone’s testimony was false and Clements’ prior statements were consistent with his trial testimony. (*Id.*) In support of this claim, Petitioner seeks to present at an evidentiary hearing “[t]he records of the statements of . . . Clements, to Stone.” (*Id.* at 90.)

At trial, Clements testified that on Saturday night, Val Cain was in his bedroom with “some girls,” Petitioner told Val to open the door, and Petitioner kicked the door. (21 RT 5775-77.) Clements testified that Petitioner did not say anything about the girls in the room and he did not recall telling Stone and the prosecutor that Petitioner told Val to “share the women in the bedroom.” (*Id.*)

The prosecutor later called David Stone, who testified that Clements told him previously that the events happened Friday night and that Clements “made reference to the fact that Tracy had said words to the effect that if . . . he, Tracy, couldn’t have the women, then Val shouldn’t have them either.” (*Id.* at 5890-94.) Stone testified that Clements’ statements to him were tape recorded and that he listened to the recording after Clements testified to refresh his recollection. (*Id.* at 5891.)

Petitioner claims that “the transcript of the tape recording of the statement by Clements confirms his testimony, and establishes that Stone’s testimony was false. . . . The prosecutor knew that Clements testified consistently with his previously taped interview, because the prosecutor was present at that interview[, . . . and] the claims by investigator Stone . . . were false.” (Pet. at 85 ¶¶ 163, 165-66 (citing Pet. Ex. 76).)

2. Analysis

1 As discussed above, “[t]o prevail on a claim based on *Mooney-Napue*, the
2 petitioner must show that (1) the testimony (or evidence) was actually false, (2) the
3 prosecution knew or should have known that the testimony was actually false, and
4 (3) [] the false testimony was material.” *Zuno-Arce*, 339 F.3d at 889. The burden
5 of demonstrating falsity rests on petitioner. *See id.*

6 The California Supreme Court could have reasonably determined that
7 Petitioner has not demonstrated the falsity of Stone’s testimony about Clements’
8 statement about the girls in the bedroom. The transcript of Stone’s interview with
9 Clements shows that Clements told Stone that Petitioner “did say something like if,
10 if you don’t get none, Val ain’t getting none either, something like that,” about the
11 girls. (Pet. Ex. 76 at 0021.) The court could have reasonably determined that the
12 statement reflected Petitioner’s instruction to Val to “share” the girls or else Val
13 shouldn’t “have them” either.

14 As to Stone’s testimony that Clements told him previously that the events
15 happened Friday night, the portion of the transcript submitted in Exhibit 76
16 suggests otherwise. Clements told Stone that the two girls were in Val’s bedroom
17 Saturday, not Friday, night. (*Id.* at 0004-05, 0019-23.) The transcript attached as
18 Exhibit 76 to the Petition appears to be truncated, however. It ends with a question
19 pending from Stone. (*See id.* at 0025.) The Court cannot determine, based upon
20 the evidence submitted, if Clements’ recollection of the events Friday and Saturday
21 nights changed or was clarified before the conclusion of the interview. The Court
22 will, therefore, include within the scope of the evidentiary hearing Claim 1(2) as to
23 Stone’s testimony about Clements’ prior statement that the girls were in Val Cain’s
24 bedroom Friday, not Saturday, night.

25 **B. Kenneth Mehaffie**

26 Petitioner contends that the prosecutor presented false testimony from
27 Kenneth Mehaffie, the Galloways’ son-in-law, regarding “whether Mr. Cain was
28 guilty of robbery, and whether the murders of the Galloways were committed

1 while Mr. Cain was engaged in the commission of a robbery” (Pet. at 147 ¶
2 360; Mot. at 85.) Petitioner alleges that Mehaffie’s subsequent testimony at
3 Cerda’s trial contradicted his allegedly false testimony in Petitioner’s trial. (Mot.
4 at 85.) In support of this claim, Petitioner seeks to present at an evidentiary
5 hearing Mehaffie’s subsequent testimony. (*Id.* at 90.)

6 **1. Factual Background**

7 At Petitioner’s trial, Mehaffie testified that William Galloway kept a small
8 brown wallet containing approximately \$1,000 in a nightstand similar to a
9 homemade desk, next to his bed. (19 RT 5322, 5324-25.) He testified that the
10 wallet Mr. Galloway carried with him, with less money, was black. (*Id.* at 5322-
11 23.) Mehaffie identified Trial Exhibit 78 as the black wallet Mr. Galloway carried.
12 (*Id.* at 5326.) Mehaffie testified that he looked for the brown wallet after police
13 were finished in the house and did not find it. (*Id.* at 5325.)

14 At Cerda’s trial, Mehaffie testified to opposite colors of the wallets. (*See*
15 Lodged Doc. C-2, Ex. C, at 76-77.) He testified that the wallet Mr. Galloway kept
16 in his bedroom in a desk-type drawer, containing approximately \$1,000 to \$1,500,
17 was black, and the wallet he carried with him with less money was brown. (*Id.*)
18 Mehaffie testified that he looked for the larger-amount wallet after the police left
19 the house and did not find it. (*Id.* at 76.) He said police showed him a brown
20 wallet with a small amount of money, which was not the wallet where Mr.
21 Galloway kept the larger amount. (*Id.* at 77.) He reported that the police told him
22 they found a wallet without any money in the bedroom, in a place where Mehaffie
23 indicated it was not normally kept. (*Id.* at 77-78.)

24 //

25 **2. Analysis**

26 Mehaffie’s subsequent testimony suggests, at most, the potential falsity of
27 his statements establishing the colors of the wallets. Petitioner presents no
28 independent evidence to establish that Mehaffie’s testimony at Cerda’s trial, rather

1 than his testimony at Petitioner's trial, was accurate. *Cf. Martin (Sidney)*, 59 F.3d
2 at 770 ("A challenge to evidence through . . . prior inconsistent statements is
3 insufficient to establish prosecutorial use of false testimony" (internal quotation
4 omitted)); *Zuno-Arce*, 339 F.3d at 889 (rejecting *Napue* claim where petitioner
5 failed to demonstrate testimony at trial was "actually false"). Likewise, Petitioner
6 has not demonstrated that the prosecution knew or should have known of any
7 falsity regarding the colors of the wallets, or any other portion of Mehaffie's
8 testimony. *See Schad v. Ryan*, 606 F.3d 1022, 1037 (9th Cir. 2010) (holding that
9 "it is not entirely clear that [the prosecution witness] lied," and "[e]ven assuming
10 he did, there is no evidence that the state knew or should have known that his
11 testimony was false"); *Hovey v. Ayers*, 458 F.3d 892, 916 (9th Cir. 2006).
12 Petitioner has not suggested any means by which the police or prosecution should
13 have known what color wallet William Galloway carried or what color wallet he
14 stored.

15 The California Supreme Court, therefore, could have reasonably denied the
16 claim on the basis that Petitioner presented no evidence to establish that Mehaffie's
17 testimony at Petitioner's trial was false or that the prosecution knew or should have
18 known of any falsity. Accordingly, Claim 1(2) as to Mehaffie's testimony at
19 Petitioner's trial is denied.

20 C. Officer Dwayne Holmbom

21 Similarly, Petitioner contends that the prosecutor presented false testimony
22 from Officer Dwight Holmbom regarding "whether Mr. Cain was guilty of
23 robbery, and whether the murders of the Galloways were committed while Mr.
24 Cain was engaged in the commission of a robbery" (Pet. at 147 ¶ 360; Mot. at
25 85.) Petitioner alleges that the subsequent testimony of Kenneth Mehaffie in
26 Cerda's trial contradicted Holmbom's allegedly false testimony. (*Id.*) In support
27 of this claim, Petitioner seeks to present at an evidentiary hearing Mehaffie's
28 testimony at the Cerda trial. (*Id.* at 90.)

1 1. Factual Background

2 At Petitioner's trial, Officer Holmbom testified that officers at the scene,
3 including Officer Holmbom and Officer Robert Hoffman, found a black men's
4 wallet on top of a drawer in the southeast bedroom of the Galloways' house. (19
5 RT 5293-94, 5296.) Officer Holmbom identified the wallet as Trial Exhibit 78.
6 (*Id.*) According to Officer Holmbom, the wallet contained \$170, a MasterCard of
7 Modena Galloway, a social security card of J. Galloway, Jr., some papers with the
8 Galloways' names and others without, and photographs. (*Id.*) Officer Holmbom
9 was asked:

10 Q. Did you look thoroughly for any other wallets in
11 that southeast bedroom where the television set
12 was?

13 A. Yes.

14 Q. Did you find any?

15 A. No.

16 Q. Did you find a brown wallet?

17 A. No.

18 (*Id.* at 5295.)

19 Officer Hoffman testified at Petitioner's trial that at the Galloways' house,
20 he took the photograph entered as Trial Exhibit 6. (19 RT 5253; Pet. Ex. 112.)
21 That photograph appears to show, among other things, a brown wallet next to a
22 brown purse in Mrs. Galloway's southwest bedroom. (Pet. Ex. 112; 19 RT 5230,
5251-53.) The wallet contains what appears to be a woman's driver's license along
with several other credit-card sized items. (*Id.*)

23 As noted above, at Cerda's trial, Mehaffie testified that Mr. Galloway kept a
24 black wallet containing approximately \$1,000 to \$1,500 in his bedroom in a desk-
25 type drawer. (*See* Lodged Doc. C-2, Ex. C, at 76-77.) Mehaffie testified that the
26 wallet Mr. Galloway carried with him with less money was brown. (*Id.*) Mehaffie
27 testified that he looked for the larger-amount wallet after the police left the house
28 and did not find it. (*Id.* at 76.) He said police showed him a brown wallet with a

1 small amount of money, which was not the wallet where Mr. Galloway kept the
 2 larger amount. (*Id.* at 77.) He also reported that the police told him they found a
 3 wallet without any money in the bedroom, in a place where Mehaffie indicated it
 4 was not normally kept. (*Id.* at 77-78.)

5 **2. Analysis**

6 The only portion of Mehaffie's testimony at Cerda's trial that could possibly
 7 illustrate a falsity in Officer Holmbom's testimony to Petitioner's detriment is that
 8 police found a brown wallet with a small amount of money in the house. However,
 9 the California Supreme Court could have reasonably determined that Officer
 10 Holmbom's testimony, in context, indicated only that he did not find a brown
 11 wallet in the southeast bedroom, not that no officer found a brown wallet anywhere
 12 in the house. "Given the ambiguity inherent in [the witness's] statement, . . . [i]n
 13 contrast to the unambiguous and false statements involved in *Giglio* and *Napue*,
 14 the present case permits a reasonable interpretation of the witnesses's statement
 15 that is entirely consistent with" the truth. *Pederson v. Fabian*, 491 F.3d 816, 822,
 16 828 (8th Cir. 2007) (upholding denial of *Napue* claim where witness testified that
 17 prosecutor did not tell him what to say, and prosecutor had provided witness with
 18 "dialogue in the format of a script" summarizing his prior statements to police and
 19 grand jury). In addition, through the testimony of Officer Hoffman, evidence was
 20 presented that a brown, apparently-women's wallet was found in the southwest
 21 bedroom. Mehaffie's subsequent testimony gave no indication whether the brown
 22 wallet he was shown was a men's or a women's wallet.

23 The California Supreme Court could have reasonably determined, therefore,
 24 that Petitioner failed to demonstrate the falsity of Officer Holmbom's testimony.
 25 See *Schad*, 606 F.3d at 1037 (rejecting *Napue* claim where "it is not entirely clear
 26 that [the prosecution witness] lied"); *Zuno-Arce*, 339 F.3d at 889 (rejecting same
 27 where petitioner failed to demonstrate testimony at trial was "actually false");
 28 *Martin (Sidney)*, 59 F.3d at 770 ("A challenge to evidence through another

1 witness,” or “[m]ere inconsistency between witnesses’ testimony . . . is insufficient
 2 to establish prosecutorial use of false testimony” (internal quotation omitted));
 3 *Nelson*, 970 F.2d at 443 (denying *Napue* claim where the “only showing made by
 4 [petitioner] is that [the witness’s] statement may have been contradicted by another
 5 witness”); *cf. United States v. Brown*, 634 F.2d at 827 (“[D]ue process is not
 6 implicated by the prosecution’s introduction or allowance of false or perjured
 7 testimony unless the prosecution actually knows or believes the testimony to be
 8 false or perjured; it is not enough that the testimony is challenged by another
 9 witness”).

10 Because the state court’s decision was not an unreasonable application of
 11 Supreme Court precedent, Petitioner is not entitled to federal habeas relief on this
 12 claim. Accordingly, Claim 1(2) as to Officer Holmbom’s testimony is denied.

13 **VII. Claims 1(2) and 2(11) as to Testimony of Edwin Jones**

14 **A. Allegations and Opposition**

15 In a portion of Claim 1(2), Petitioner alleges that the prosecution committed
 16 “*Giglio* error by knowingly using unfounded and scientifically unsupportable hair
 17 evidence presented by a purported ‘expert’ witness, Edwin Jones, whom the
 18 prosecutor knew to be unqualified.” (Pet. at 146-47 ¶ 356 (citations omitted).)
 19 Petitioner argues that the hairs found at the crime scene were the only physical
 20 evidence that “possibly appeared to link Mr. Cain to the crimes,” (Pet. at 77 ¶ 149),
 21 including the allegations of rape or attempted rape. He claims that Jones “was not
 22 sufficiently qualified to be certified as an expert testifying on the subject
 23 of hair identification and testing.” (*Id.* ¶ 150.) Petitioner alleges that Jones “lied
 24 on the stand about his qualifications and abilities” to identify the hairs and to
 25 conduct an electrophoresis test, and lied about his results. (Mot. at 84-85.) He
 26 further alleges that at the time of his trial, “numerous recognized scientific and law
 27 enforcement authorities (including the Federal Bureau of Investigation) had
 28 concluded that ‘leg/body’ hair is of absolutely no scientific value for identifying a

1 specific person as the source thereof.” (Pet. at 77-78 ¶ 151(c) (emphasis
 2 removed).) Petitioner contends that the identification of “leg/body” hair,
 3 eletrophoresis testing of hair, and microscopic analysis of hair “do[] not meet the
 4 legal standards for admission of scientific evidence set forth in *Daubert v. Merrell*
 5 *Dow Pharmaceuticals, Inc.*, 509 U.S. 579 [] (1993) and *People v. Kelly*, 17 Cal. 3d
 6 24 [] (1976).” (*Id.* at 78-79 ¶ 151 (c)-(g).)

7 Relatedly, in a portion of Claim 2(11), Petitioner argues that trial counsel
 8 was ineffective for failing to challenge the scientific basis for the admission of
 9 Jones’ testimony, to contest Jones’ qualifications as an expert, to adequately cross-
 10 examine Jones about his results, to proffer any contradictory expert testimony, to
 11 have tested other hairs found at the scene, and to adequately address Jones’
 12 testimony in closing argument. (Pet. at 80-81 ¶ 153, 179 ¶ 464; Mot. at 69-70.)

13 Respondent argues in opposition that hair comparison evidence that
 14 identifies a suspect as a possible donor has been “routinely admitted in California
 15 for many years without any suggestion that it violated *Kelly/Frye*,” relying upon
 16 *California v. Pride*, 3 Cal. 4th 195, 238-39 (1992) (affirming 1986 conviction).
 17 (Opp. at 63-65, 78.) Respondent also emphasizes that Petitioner “had a defense
 18 criminalist, Richard Fox, present at the time that Criminalist Jones conducted the
 19 ‘electrophoretic test’ on the pubic hair. (RT 5416.) Petitioner has provided no
 20 evidence from Criminalist Fox to challenge the validity of Jones’s findings.” (*Id.*)

21 **B. Background**

22 This Court ruled, as to the qualifications of Edwin Jones:

23 Since Petitioner was already provided with the means to
 24 demonstrate that the pubic hairs found at the scene were
 25 not his [through DNA testing], there is not good cause to
 26 support an attempt to discredit the testimony on the hairs
 27 by examining . . . the qualifications of the technicians
 28 employed at the [Ventura County sheriff’s office]
 laboratory. Rather Petitioner should be able to
 demonstrate by the results of the DNA testing that the

1 trial testimony on the hairs was inaccurate or unreliable.
 2 (Order re Pet'r's Outstanding Discovery Requests, Sept. 24, 2002, at 11.) Jones
 3 was employed at the laboratory and examined and tested the hairs at issue. (20 RT
 4 5399, 5401-16.)

5 The results of the DNA testing were provided to the Court on January 21,
 6 2003. The testing could not conclusively demonstrate that the pubic hairs found at
 7 the scene were not Petitioner's or that the trial testimony on the hairs was
 8 inaccurate or unreliable. The results indicate that the root of the hair sample found
 9 on Modena Galloway's underwear contained DNA that would be found in
 10 approximately 1 in 210 African Americans, approximately 1 in 2,400 Caucasians,
 11 and approximately 1 in 1,800 Hispanics.⁵ (Joint Presentation of Original DNA
 12 Testing Results Pursuant to Ct. Order, Pet. Ex. 194, filed Jan. 24, 2003 ("DNA
 13 Testing Results"), at 4.) Based upon a comparison of the hair samples to
 14 Petitioner's DNA sample, the report concluded that "Tracy Cain cannot be
 15 eliminated as the source of the DNA from this sample." (DNA Testing Results at
 16 4.)

17 **C. Jones' Testimony**

18 **1. Qualifications and Methods**

19 Jones was a criminalist in the Ventura County sheriff's crime laboratory, in
 20 the serology and trace evidence section. (20 RT 5399.) He testified that he had an
 21 M.S. degree in forensic chemistry from the University of Pittsburgh, an M.S.
 22 degree with a thesis in biochemistry from Marshall University, and a B.S. degree in
 23 chemistry from West Virginia Wesleyan College. (*Id.*) Jones stated that he
 24 worked for one year with the Georgia State Crime Laboratory in its trace evidence
 25 and firearm section, for seven and one-half years at the Fountain Valley Police
 26 Department performing criminalistics and crime lab work, and for five years in his
 27 _____

28 ⁵ By his own allegations, "[o]f the four individuals identified by various people as being involved in the crime, . . . [o]nly one, Mr. Cain, was African-American." (Pet. at 302-03 ¶ 817(a).)

1 current position. (*Id.* at 5399-5400.) He indicated that he was a member of the
2 American Academy of Forensic Science, the California Association of
3 Criminalists, and the Los Angeles Microscopical Society, that he had specialized
4 training from the Federal Bureau of Investigation “in hairs,” and that he had
5 testified as a “hair expert” in Ventura County on a number of occasions. (*Id.* at
6 5400.)

7 Jones testified that he used a “comparison microscope system,” comprised of
8 two microscopes “set up with identical optical systems on both sides,” manually
9 adjusted to provide equal lighting and connected with an optical bridge to bring
10 both fields of view into one. (*Id.*) Jones stated that he compared the hairs found at
11 the scene with hairs from known, potential sources, examining the hairs’ root
12 structure, pigment granules, medulla, cortex, cuticle, length, and diameter. (*Id.* at
13 5400-07.)

14 Jones also testified that he performed an electrophoresis test, a chemical
15 analysis used to determine the multiple types of enzymes within the blood of
16 different individuals. (*Id.* at 5415.) He told the jury that there are “seven different
17 systems that we use and most people are different in one or more of those systems .
18 . . . Studies have been done to show whenever there is root sheath material on
19 hairs, . . . [it] will display the same enzyme types or the same electrophoretic
20 patterns as from the individual[’s] . . . blood.” (*Id.*) About the electrophoresis test,
21 Jones relayed, “[I]t’s a one-time shot. You only get to run the hair one time,” out
22 of the “group 1,” “group 2,” and “PGM” subgroups. (*Id.* at 5418.) Jones testified
23 that a defense criminalist, Richard Fox, was present during the electrophoresis test
24 at Jones’ request. (*Id.* at 5416.)

25 2. Results

26 Jones indicated that he found three foreign hairs on Mrs. Galloway’s
27 underwear collected at the house. (20 RT 5403-04.) Jones identified the longest of
28 the three hairs as a pubic hair. (*Id.* at 5407-08.) He testified that the pubic hair

1 “could have come from Tracy Cain, and . . . [Jones] would expect to find [its
2 cuticle structure and hair tip characteristics] in very few people in the general
3 population.” (*Id.* at 5413-14.) Jones stated that he performed an electrophoresis
4 test and identified the phosphoglucumutase (PGM) enzyme subgroup of the hair’s
5 root sheath material as 1+. (*Id.* at 5416-17, 5421.) The 1+ subgroup could match
6 only Modena Galloway, Floyd Clements, and Petitioner as possible sources, he
7 said.⁶ (*Id.* at 5421.) Jones eliminated Modena Galloway and Clements as potential
8 sources through microscopic examination (*id.* at 5421-22), leaving only Petitioner
9 as a possible source of the hair among the identified, potential donors.

10 Jones compared the two shorter hairs found on the underwear to leg hairs
11 from Petitioner. (*Id.* at 5424.) He concluded that the hairs “could have come from
12 Tracy Cain” based upon “[b]oth gross and microscopic structure.” (*Id.*)

13 Jones also microscopically compared hairs found on Modena Galloway’s
14 pajama top, pajama bottoms, and socks to Petitioner’s leg and pubic hairs. (*Id.* at
15 5427-36.) He found that the hair on the pajama bottoms was “similar in all
16 respects that [he] could measure” to Petitioner’s leg hair. (*Id.* at 5428.) He
17 testified that while the pubic hair on the pajama top might look different in its
18 microphotograph from that of Petitioner’s, they had “striking” similarities in their
19 pigment granules, their “strange” cuticular structures, and their “splitting.” (*Id.* at
20 5431-32.) Jones indicated that the “splitting” feature is present on “25 percent of
21 all pubic hair samples that I see. But again, that eliminates 75 percent of the
22 population.” (*Id.* at 5432.) Jones also compared six non-pubic hairs on the pajama
23 top to Petitioner’s leg hairs and found them to be “microscopically similar. That is,
24 they could have come from Tracy Cain.” (*Id.* at 5433.) He compared a seventh
25

26 ⁶ The transcription of Jones’ initial testimony on these possible sources is ambiguous about
27 whether Petitioner was included in this group. The record reflects that Jones, identifying the
28 group, stated that it “included Tracy Cain – excuse me Floyd Clements and Modena Galloway.”
(20 RT 5421.) His later testimony that the hair could have come from Petitioner resolves that
ambiguity, however. (*See id.* at 5436.)

1 non-pubic hair to Petitioner's body hair and found that it was "microscopically
 2 similar and could have come from Tracy Cain." (*Id.* at 5433-34.) Finally, Jones
 3 compared one pubic hair fragment and two leg hairs from Modena Galloway's
 4 socks to Petitioner's corresponding hairs, and found them to be "microscopically
 5 similar. And they could have . . . come from Tracy Cain." (*Id.* at 5434-35.)

6 On cross-examination, Petitioner's counsel elicited testimony from Jones
 7 that 37% of the general population in Ventura County would be identified as PGM
 8 1+, and that PGM 1 activity is found in approximately 44% of the black
 9 population. (*Id.* at 5452-53.) Defense counsel cross-examined Jones about the
 10 differences between class characteristics, as seen in hair analysis, and unique
 11 characteristics. (*Id.* at 5448-52.) He repeatedly elicited testimony from Jones that
 12 while the hairs *could* have come from petitioner, his testimony was "not that in fact
 13 those hairs *did* originate from Tracy Cain." (*Id.* at 5452 (emphasis added).)
 14 Nevertheless, on redirect examination, Jones testified that of the standard hairs he
 15 had examined from approximately 1,000 people in his career, he had never seen
 16 one that had the same cuticle characteristic as the pubic hairs taken from Petitioner
 17 and found on the underwear. (*Id.* at 5459.) Trial counsel again questioned on
 18 recross-examination, "Notwithstanding all of your training, your education, your
 19 expertise, you still are not telling the jury that those hairs in the panties and the
 20 other hairs from the scene did in fact come from Tracy Cain, are you?" (*Id.* at
 21 5463.) Jones replied, "That's correct." (*Id.*)

22 //

23 **D. Legal Standard regarding Prosecutorial Misconduct**

24 Petitioner contends that the prosecution knowingly withheld evidence
 25 regarding Jones' lack of qualifications, constituting *Giglio* error. (Pet. at 146-47 ¶¶
 26 356-58 (referencing *Giglio v. United States*, 405 U.S. 150 (1972)).) The Supreme
 27 Court analyzed the constitutional violation in *Giglio* as a *Napue* violation, holding,
 28 "A new trial is required if 'the false testimony could . . . in any reasonable

1 likelihood have affected the judgment of the jury” *Id.* at 154 (quoting *Napue*,
 2 360 U.S. at 271). “[T]he touchstone of due process analysis in cases of alleged
 3 prosecutorial misconduct is the fairness of the trial [T]he aim of due process is
 4 not punishment of society for the misdeeds of the prosecutor but avoidance of an
 5 unfair trial to the accused.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (internal
 6 quotation omitted).

7 **E. Analysis**

8 Petitioner was tried in 1988. The California Supreme Court has since held
 9 that the microscopic comparison of hairs found at a crime scene to those of
 10 potential sources “to determine whether they were similar in length, shape,
 11 pigment, damage, and component structure,” in 1986, was an established scientific
 12 technique. *California v. Pride*, 3 Cal. 4th 195, 238 (1992). The court held:

13 Hair comparison evidence that identifies a suspect or
 14 victim as a possible donor has been routinely admitted in
 15 California for many years without any suggestion that it
 16 is unreliable under *Kelly/Frye*. It would have been
 17 anomalous for the [trial] court to conclude that [the
 18 expert’s] testimony involved an unfamiliar procedure at
 this late date. . . . No *Kelly/Frye* showing was necessary
 [before the admission of the testimony]. . . .

19 *Id.* (collecting cases from 1974 to 1987, among others) (internal quotation
 20 omitted).

21 The California Supreme Court could have reasonably concluded that its
 22 holding in *Pride* establishes that Petitioner’s counsel could not have succeeded on
 23 a motion to exclude testimony on microscopic hair examination. Counsel would
 24 not, therefore, have been deficient on that basis. *See Juan H. v. Allen*, 408 F.3d
 25 1262, 1273 (9th Cir. 2005) (“trial counsel cannot have been ineffective for failing
 26 to raise a meritless objection”); *United States v. Molina*, 934 F.2d 1440, 1447 (9th
 27 Cir. 1991) (holding that because evidence was admissible, “the decision not to file
 28 a motion to suppress it was not prejudicial. . . . [I]t is not professionally

1 unreasonable to decide not to file a motion so clearly lacking in merit”).

2 However, while the record suggests that trial counsel retained a defense
3 criminalist, (20 RT 5416), the scope of any expert assistance counsel obtained is
4 unclear. *Compare Moore v. Gibson*, 195 F.3d 1152, 1167 (10th Cir. 1999) (noting
5 “defense counsel ably challenged . . . [the hair expert’s] qualifications, and her
6 testing methods. He also had a defense expert available to guide and inform his
7 cross-examination” (citations omitted)). Whether counsel could have challenged
8 Jones’ testimony that “root sheath material will display the same enzyme types or
9 the same electrophoretic patterns as from the individual[’s] . . . blood” (*id.* at 5415)
10 remains an open question. Similarly, whether trial counsel adequately investigated
11 Jones’ qualifications, and whether the prosecution withheld any information or
12 presented any false testimony about Jones’ qualifications or test results, would be
13 clarified by a hearing.

14 If the prosecutor committed misconduct in presenting Jones’ testimony or
15 trial counsel was ineffective in challenging it, Petitioner may be able to
16 demonstrate an impact on the fairness of his trial. *Cf. Moore*, 195 F.3d at 1167; *but*
17 *see Wilson v. Parker*, 515 F.3d 682, 705-06 (6th Cir. 2008) (“Absent Supreme
18 Court precedent showing a constitutional violation based on the use of hair-
19 matching evidence, we hold that [petitioner] has not demonstrated that the
20 admission of the evidence denied him a fair trial”). An evidentiary hearing is
21 necessary to resolve the “heavily fact-dependent” issues of (1) whether the
22 prosecution presented false testimony or withheld evidence regarding Jones’
23 qualifications and the electrophoresis testing he performed; (2) whether defense
24 counsel adequately investigated and challenged Jones’ qualifications and his
25 electrophoresis testing; and, more generally, (3) whether defense counsel
26 adequately consulted with an independent hair analysis expert. *See Earp*, 431 F.3d
27 at 1173, 1176. The Court will, therefore, include those issues within the scope of
28 the evidentiary hearing.

1 **VIII. Claims 1(2) and 2(11) as to Testimony of Bruce Woodling, M.D.**

2 In a portion of Claim 1(2), Petitioner alleges that the prosecution committed
3 “misconduct by presenting the unqualified testimony of Bruce Woodling, M.D.
4 . . .” (Pet. at 147 ¶ 359.) Likewise, in Claim 2(11), Petitioner argues that trial
5 counsel was ineffective for failing to challenge Dr. Woodling’s qualifications. (Pet.
6 at 179 ¶ 464; Mot. at 69-70.)

7 **A. Background**

8 This Court found good cause for discovery on Dr. Woodling’s
9 qualifications. (See Order re: Petitioner’s Motion to Conduct Initial Discovery,
10 Mar. 5, 2001, at 18-20.) As the Court summarized:

11 “Petitioner claims that since Dr. O’Halloran could not support the
12 prosecution’s theory that Modena Galloway was raped, the prosecution presented
13 the testimony of Dr. Bruce Woodling, a physician who was board certified in
14 family practice. RT 5679. Dr. Woodling testified that he had been involved in
15 forensic medicine for about fifteen years, RT 5679, and that he had probably
16 examined over 2,000 sexual assault victims during his career. RT 5695. On
17 cross-examination Dr. Woodling testified that he was not a gynecologist, nor a
18 pathologist, nor was he certified as a forensic pathologist. RT 5707-5708.
19 However, he stated that while he had never performed an autopsy, he had
20 participated in at least 25, primarily in Ventura County. RT 5709. Dr. Woodling
21 testified that he believed the victim was raped, because he concluded that the tear
22 in the victim’s vagina was inflicted pre-mortem and not caused by Dr.
23 O’Halloran’s examination. RT 5700-5703.

24 Petitioner contends that his investigation has revealed that Dr. Woodling’s
25 claims are false and perjurious, and that he was not qualified to opine on the
26 post-mortem examination of a rape victim. According to Petitioner there is no
27 record of Dr. Woodling ever performing or attending any autopsies at any Southern
28 California coroner’s office. This cannot be reconciled with Dr. Woodling’s

1 testimony that he attended at least 25 autopsies, most of which occurred in Ventura
2 County.” (*Id.* at 18.)

3 **B. Analysis**

4 First, Petitioner concedes that “the prosecution’s arguments on the vaginal
5 ‘tear’ had been rebutted by its own coroner.” (Pet. at 147 ¶ 357.) Indeed, the jury
6 acquitted Petitioner of rape, which required “an act of sexual intercourse.” Cal.
7 Penal Code § 261(a). The jury instead found true the special circumstance of
8 attempted rape, which required “a direct *but ineffectual* act toward its
9 commission.” *California v. Osband*, 13 Cal. 4th 622, 692 (1996) (citing *California*
10 *v. Memro*, 38 Cal.3d 658, 698 (1985)) (emphasis added). Thus, the jury found that
11 Petitioner did not complete an act of sexual intercourse with Modena Galloway,
12 notwithstanding Dr. Woodling’s testimony that the tear was caused from impact by
13 a penile-type object (*see, e.g.*, 21 RT 5700).

14 As to the jury’s affirmative finding of attempted rape, California law
15 provides that “[a]ny sexual penetration, however slight, is sufficient to complete
16 the crime” of rape. Cal. Penal Code § 263. The tear Drs. Woodling and
17 O’Halloran observed was located over one centimeter inside the vagina (21 RT
18 5698; *see also* 20 RT 5381 (describing tear as “just inside the vaginal opening”)),
19 and there was no evidence that any object, similar to but distinct from Petitioner’s
20 penis, was involved in an attempt to rape Modena Galloway.

21 The California Supreme Court may have reasonably concluded, therefore,
22 that Petitioner failed to allege facts to show a reasonable likelihood that Dr.
23 Woodling’s testimony influenced the jury’s finding of attempted rape. Thus, even
24 assuming *arguendo* that Petitioner could prove his allegations that Dr. Woodling
25 lied about his qualifications and was unqualified to offer the opinion that the tear
26 was caused from impact by a penile-type object (*see, e.g.*, 21 RT 5700),⁷ the court

27
28 ⁷ The Court notes that Dr. Woodling explained his trial testimony in his response to Petitioner’s subpoena as follows: “I do not have any documents or an independent recollection of the specific

1 could have reasonably determined that Petitioner has not demonstrated the
 2 materiality of that testimony, or prejudice from counsel's failure to challenge it.
 3 *See Smith v. Phillips*, 455 U.S. at 220 n.10; *Strickland*, 466 U.S. at 694. As noted
 4 above, "the touchstone of due process analysis in cases of alleged prosecutorial
 5 misconduct is the fairness of the trial. . . . Even in cases of egregious prosecutorial
 6 misconduct, such as the knowing use of perjured testimony, we have required a
 7 new trial only when the tainted evidence was material to the case." *Smith v.*
 8 *Phillips*, 455 U.S. at 219, 220 n.10; *see also Jackson v. Brown*, 513 F.3d 1057,
 9 1076 (9th Cir. 2008) (observing that materiality determination in a *Napue* violation
 10 is whether "there is any reasonable likelihood that the false testimony could have
 11 affected the judgment of the jury" (internal quotation omitted)).

12 The state court's decision on these points would not have been an
 13 unreasonable application of Supreme Court precedent. Petitioner is, therefore, not
 14 entitled to federal habeas relief on Claims 1(2) or 2(11) as to Dr. Woodling.

15 **IX. Claim 1(2) as to Petitioner's Statement to Police**

16 In a portion of Claim 1(2), Petitioner alleges the prosecution committed
 17 misconduct in "knowingly presenting the perjured testimony of Detective Tatum
 18 regarding Cain's alleged unrecorded 'confession.'" (Pet. at 146 ¶ 353.) In its
 19 September 2002 Order, the Court addressed Petitioner's motion for discovery
 20 regarding "the taped interrogation of Petitioner and the testimony of prosecution
 21 witness and investigating officer, Detective Tatum." (Order re Pet'r's Outstanding
 22 Discovery Requests, Sept. 24, 2002, at 8.) The Court explained:

23 "Det. Tatum testified that Petitioner confessed to the robbery crimes during
 24 _____

25 autopsies I previously attended or participated in prior to the trial in this matter. However, I do
 26 have a recollection of having attended approximately 25 autopsies prior to the trial in this matter.
 27 I do not have any documents or an independent recollection of the number or victim names of
 28 autopsies I attended prior to the trial in this matter." (Pet. Ex. 190 at 24.) In addition, the Major
 Crimes Supervisor for the Office of the District Attorney, County of Ventura responded to
 Petitioner's subpoena that he did "not know whether Dr. Woodling attended any autopsies prior to
 the trial of Tracy Cain – he never attended any in my presence." (Pet. Ex. 188 at 8.)

1 the interrogation, but that the tape recorder ‘malfunctioned’ and failed to record
2 this confession. Petitioner has consulted with an expert in forensic analysis of
3 tapes, Fausto Poza, who analyzed the tape and found no anomalies or any other
4 indications that the tape recorder malfunctioned and ceased to record at any time,
5 on either side. Exhibit 174: Fausto Poza Decl. Accordingly, Petitioner states that
6 a preliminary investigation indicates that Det. Tatum’s claim of the malfunction
7 was false and his testimony was perjurious.

8 The interrogation was conducted by Detectives Billy Tatum and John Garcia
9 of the Oxnard Police Department. During the interrogation, held on October 22,
10 1986, Petitioner stated that the day after the murder he, Rick, Cerda and Mendoza,
11 went into the Galloway house to ‘wipe away the fingerprints.’ Throughout the
12 interview Petitioner maintained that he did not murder either of the victims or rape
13 Mrs. Galloway. At trial Det. Tatum testified that during the interview Petitioner
14 admitted stealing \$500 from the Galloways during the initial break-in to the
15 residence on Friday, October 17, 1986. While Det. Tatum noted that the interview
16 was tape recorded, he claimed that due to a malfunction in the tape recorder,
17 Petitioner’s admission was not recorded. RT 5863-64. Det. Tatum also testified
18 that the malfunction was not a result of the tape recorder running out of tape, but
19 rather that ‘it stopped taping on Side 1.’ RT 5870. Det. Tatum stated that he
20 learned of the malfunction shortly after it occurred. RT 5870.

21 The Court notes that Det. Tatum reported that after informing Petitioner that
22 Cerda had been arrested and [had] provided a statement of his involvement in the
23 crimes, ‘during this time the tape recorder malfunctioned for a short period of time
24 as the tape was being turned over. During this time the suspect made indications
25 that he had entered the victims’ residence and took \$500; however, this portion of
26 the recording did not come out.’ Exhibit 103: Follow-up Report by Det. Billy
27 Tatum, dated 10-27-86 at 3 (Murder Book). Thus, although Det. Tatum testified
28 that the malfunction was not due to the tape recorder running out of tape, RT 5870,

1 his contemporaneous report indicates that the malfunction might simply be a
 2 product of switching the tape from side 1 to side 2. Exhibit 103: Follow-up
 3 Report by Det. Billy Tatum, dated 10-27-86 at 3 (Murder Book).” (Order re
 4 Pet’r’s Outstanding Discovery Requests, Sept. 24, 2002, at 8-9 (footnote omitted).)

5 Petitioner’s expert, Fausto Poza, reports in his declaration that:

6 based on the announced times at the ending and
 7 beginning of the interview, it would appear that there was
 8 an interval of approximately twenty minutes between the
 9 end of side A and the start of side B that was not
 10 recorded. . . . That twenty minute period, however,
 11 cannot be accounted for due to some anomalous break
 during the recording on either side of the interview tape.
 (Pet. Ex. 174 ¶ 4.)

12 The Court noted that because claims of prosecutorial misconduct must be
 13 analyzed cumulatively, Detective Tatum’s allegedly false trial testimony could
 14 support Petitioner’s claims notwithstanding Petitioner’s admission that he had gone
 15 in the victim’s house “to get some money,” and Mendoza’s testimony that he
 16 counted \$500 in Petitioner’s possession after the murders. (Order re Pet’r’s
 17 Outstanding Discovery Requests, Sept. 24, 2002, at 9-10.)

18 Petitioner has alleged facts that, if proved, could demonstrate the falsity of
 19 Detective Tatum’s testimony that because of a malfunction, beyond simply running
 20 out of tape, the tape recorder stopped taping on side 1. An evidentiary hearing is
 21 necessary to resolve the credibility and weight of the witnesses’ testimony. *See*
 22 *Earp*, 431 F.3d at 1173. Accordingly, this portion of Claim 1(2) will be included
 23 within the scope of the evidentiary hearing.

24 **X. Claim 2(1) as to Conflict of Interest and Claim 11(11)**

25 In a portion of Claim 2(1) and in Claim 11(11), Petitioner alleges that he was
 26 denied effective assistance of counsel and competent expert assistance as a result
 27 of a conflict of interest between Petitioner and his trial counsel, a member of
 28 Conflict Defense Associates (“CDA”). A second attorney from CDA represented

1 Petitioner's co-defendant, David Cerda. Petitioner alleges his counsel "failed to
2 present and emphasize significant evidence further implicating Cerda in the crimes
3 at issue . . . includ[ing] the fact that a jail-house informant, Dale Rodabaugh, had
4 given a taped statement" to police regarding Cerda's involvement, and "a light blue
5 jacket, size small, was found blood-soaked at the scene, and identified as belonging
6 to Cerda." (Mot. at 59.) Petitioner alleges that he received a "perfunctory
7 representation" and that "CDA made Cain the fall guy" and did not challenge the
8 prosecution's theory that Petitioner was the leader of the group. (*Id.* at 60.)
9 Petitioner further alleges that the conflict of interest deprived him of competent
10 expert assistance, as the same mental health expert who had evaluated Cerda, Dr.
11 Theodore Donaldson, was asked to examine Petitioner. (*Id.*; *see also* Pet. at 244 ¶
12 661.) Petitioner argues that "Dr. Donaldson did not address the issue of his
13 potential conflict in evaluating two persons charged with the same crime and
14 incorporating the results of one evaluation into the other." (Mot. at 61.)

15 The Court previously considered these claims. The Court held that "an
16 examination of each of these alleged omissions [by trial counsel] shows that they
17 do not constitute an adverse effect arising from the alleged conflict of
18 interest" (Order re Pet'r's Outstanding Discovery Requests, Sept. 24, 2002, at
19 17-18.) In so ruling, the Court considered alleged omissions regarding the
20 statement by informant Rodabaugh, the jacket found at the crime scene, and
21 Petitioner's mental ability to be the group leader, as well as Petitioner's allegation
22 that his representation was "perfunctory" and made him "the fall guy." (*Id.* at 18-
23 21.)

24 The Court also considered Petitioner's allegation of a conflict of interest in
25 the use of Dr. Donaldson to evaluate both Cerda and Petitioner. (*Id.* at 22.) The
26 Court held that "[u]nless Petitioner can show that attorney John Brown [who asked
27 Dr. Donaldson to evaluate Cerda] was associated with CDA, Petitioner cannot
28 support the allegation that the appointment of Dr. Donaldson was an adverse effect

1 arising from a conflict of interest on the part of his attorney Mr. Wiksell.” (*Id.* at
 2 23.) Petitioner presents no evidence in his Motion that John Brown was associated
 3 with CDA.

4 The California Supreme Court could have reasonably denied Petitioner’s
 5 claims on these grounds. Petitioner is, therefore, not entitled to federal habeas
 6 relief on this portion of Claim 2(1) or on Claim 11(11). Claim 11(11) is denied.

7 **XI. Claims 2(2) and 2(14) as to Guilt- and Penalty-Phase Concessions and**
 8 **Claim 10(1)**

9 Petitioner moves for an evidentiary hearing on his claims that trial counsel
 10 provided ineffective assistance by admitting Petitioner’s guilt and misrepresenting
 11 Petitioner’s personal characteristics in his guilt- and penalty-phase opening and
 12 closing arguments. (Mot. at 16-17, 74.) Petitioner raises these allegations in his
 13 Petition as Claims 2(2) (in part, Pet. at 168 ¶ 439), 2(14) (in part, Pet. at 180 ¶ 470
 14 (“guilt phase closing argument . . . telling the jury that Mr. Cain was a ‘bad guy’
 15 who should be convicted for ‘what he has done’”), and 10(1). Petitioner’s specific
 16 allegations are set forth below.

17 **A. Application of *Strickland* Standard**

18 So long as counsel’s opening statement and closing argument do not
 19 “abandon all meaningful adversarial testing of the prosecution’s case,” counsel’s
 20 performance is subject to analysis under the *Strickland* standard of error and
 21 prejudice. *United States v. Thomas*, 417 F.3d 1053, 1059 (9th Cir. 2005)
 22 (distinguishing *United States v. Cronin*, 466 U.S. 648 (1984); *United States v.*
 23 *Swanson*, 943 F.2d 1070 (9th Cir. 1991)); *Pizzuto v. Arave*, 280 F.3d 949, 958-59
 24 (9th Cir. 2002) (applying meaningful adversarial testing standard to penalty phase
 25 of capital trial), *concurring and dissenting ops. amended*, 385 F.3d 1247 (9th Cir.
 26 2004).

27 The California Supreme Court could have reasonably held that counsel
 28 subjected the prosecution’s case to meaningful adversarial testing in his guilt-phase

1 and penalty-phase opening statements and closing arguments.

2 In his brief guilt-phase opening statement, counsel asserted that Petitioner
3 did not strike or kill the Galloways (19 RT 5214-16) and that there was no semen,
4 seminal fluid, or trauma as evidence of rape (*id.* at 5215). In his guilt-phase
5 closing argument, counsel argued the prosecution had not proved robbery beyond a
6 reasonable doubt (23 RT 6114, 6130), asserted the evidence of rape relied upon
7 conjecture and speculation (*id.* at 6117-19, 6124, 6127-29), rebuffed the
8 qualifications of the prosecution's expert witness on rape (*id.* at 6120-24), attacked
9 Mendoza's credibility (*id.* at 6135-43), emphasized that someone else was in the
10 Galloways' house at the time of the murders (*id.* at 6143-45), maintained that
11 Petitioner did not commit the murders and the prosecution had not proved it
12 beyond a reasonable doubt (*id.* at 6145-46), argued that Petitioner was under the
13 influence of alcohol and drugs (*id.* at 6148), and contended that Petitioner lacked
14 any intent to kill necessary to prove the special circumstances beyond a reasonable
15 doubt (*id.* at 6130-33, 6147-49).

16 In his penalty-phase opening statement, counsel argued that a jury found
17 Petitioner not guilty of any felony in connection with one prior crime (24 RT
18 6543); Petitioner's family members cared about his life (*id.* at 6544); Petitioner
19 was a hard worker and a cooperative prisoner (*id.* at 6545); Petitioner was unfairly
20 singled out for the death penalty (*id.* at 6547); and the jury should make a reasoned
21 and merciful choice for a sentence of life without parole (*id.* at 6548). In his
22 penalty-phase closing argument, counsel reminded the jury that they stated during
23 *voir dire* they would be open to a penalty other than death (*id.* at 6814-15),
24 distinguished Petitioner's crime from premeditated, "abhorrent" murders
25 committed by prior murderers (25 RT 6813, 6815-19, 6829-30, 6835), contended
26 that each alleged prior criminal activity had not been proved beyond a reasonable
27 doubt and/or should not be considered toward a death sentence (*id.* at 6819-23),
28 submitted that there was lingering doubt (*id.* at 6830-31, 6835), argued that it was

1 unjust and prejudicial for Petitioner to face the death penalty in comparison to the
 2 others involved in the crimes (*id.* at 6831-34), asserted that Petitioner was impaired
 3 from drugs (*id.* at 6816-17, 6829-30, 6835, 6843), challenged the prosecution's
 4 argument that Petitioner grew up with many advantages (*id.* at 6826), presented
 5 Petitioner as a hard worker with good qualities (*id.* at 6827-28, 6835, 6837, 6844-
 6 46, 6848), countered any prosecution argument that Petitioner's "attitude" should
 7 be considered in aggravation (*id.* at 6843-44), and maintained that a penalty of life
 8 without parole would meet all of society's interests in sentencing (*id.* at 6823-25,
 9 6837-43, 6847-48).

10 Thus, the state high court could have reasonably determined that counsel
 11 submitted the prosecution's case to meaningful adversarial testing during guilt- and
 12 penalty-phase opening and closing arguments. To prevail on a claim of ineffective
 13 assistance of counsel based on those arguments, then, Petitioner must demonstrate
 14 error and prejudice under *Strickland*. *Thomas*, 417 F.3d at 1059.

15 **B. Guilt-Phase Arguments**

16 **1. Allegations**

17 Petitioner argues it was ineffective assistance for counsel, during his guilt-
 18 phase opening statement, to admit Petitioner's "guilt of virtually all the charges .
 19 . . [and] that he had a 'strong suspicion' that Mr. Cain was the actual killer"⁸ (Pet.
 20 at 168 ¶ 438). Petitioner alleges counsel was ineffective during guilt-phase closing
 21 argument for "ma[king] even more serious admissions regarding Mr. Cain's guilt,"
 22 (*id.* at 168 ¶ 439), including "telling the jury that Mr. Cain was a 'bad guy' who
 23 should be convicted for 'what he has done,'" (*id.* at 180 ¶ 470), and "ending with a
 24 twice-repeated invitation to the jury to return a verdict finding Mr. Cain guilty" (*id.*
 25 at 168 ¶ 439).

26 **2. Legal Standard regarding Guilt-Phase Arguments**

27
 28 ⁸ (*See infra* p. 50 n.9 (regarding "strong suspicion" statement in closing, not opening, argument).)

1 “[I]n some cases a trial attorney may find it advantageous to his client’s
2 interests to concede certain elements of an offense or his guilt of one of several
3 charges.” *Swanson*, 943 F.2d at 1075-76 (holding petitioner was presumptively
4 prejudiced where, unlike here, defense counsel “told the jury that no reasonable
5 doubt existed as to his client’s identity as the perpetrator of the only crime charged
6 in the indictment”) (internal quotation omitted). In *Visciotti v. Woodford*, for
7 example, the Ninth Circuit held that counsel’s concession of defendant’s guilt of
8 felony murder, in an attempt to distinguish premeditated murder, was not
9 prejudicial. 288 F.3d 1097, 1108 (9th Cir.), *rev’d on other grounds*, 537 U.S. 19
10 (2002). On facts quite similar to those at hand, the court reasoned:

11 One can question [counsel’s] closing argument strategy
12 . . . since the jury could convict [defendant] of first
13 degree murder under the felony murder rule without
14 finding premeditation or a specific intent to kill. It is
15 important to keep in mind, however, the context in which
16 [counsel] was lawyering. This was a death penalty case
17 in which the prosecution was making a strong effort to
18 portray the murder and attempted murder as cold-blooded
19 [and] pre-meditated, . . . and virtually no effective
20 defense to the felony murder charge was available for
21 defense counsel to argue. In that context, the focus of
22 [counsel’s] closing argument [was] on disproving
23 premeditation and the cold-blooded nature of the murder
24 . . . as a jury might be less likely to impose the death
25 penalty on someone convicted of felony murder, as
26 opposed to someone who set out to commit a pre-
27 meditated murder.”

28 *Id.* at 1107 (affirming denial of guilt-phase ineffective assistance of counsel claim).

29 The United States Supreme Court reached a similar conclusion in *Florida v.*
30 *Nixon*, 543 U.S. 175 (2004). There, the Court held that trial counsel was not
31 ineffective for conceding guilt on capital murder charges in both opening and
32 closing argument, where the defendant confessed to the murder to police and

1 others, witnesses saw the defendant with the victim and with her belongings, and
 2 the defendant's palm print was found on her car as he described. *Id.* at 180. The
 3 Court found it reasonable that counsel "feared that denying [defendant's]
 4 commission of the kidnaping and murder during the guilt phase would compromise
 5 [counsel's] ability to persuade the jury, during the penalty phase [Counsel]
 6 concluded that the best strategy would be to concede guilt, thereby preserving his
 7 credibility in urging leniency during the penalty phase." *Id.* at 181; *see also*
 8 *Rushing v. Butler*, 868 F.2d 800, 805 (5th Cir. 1989) (holding petitioner
 9 demonstrated neither deficient performance nor prejudice where counsel's remarks
 10 were "an accurate reflection of the record in th[e] case," and counsel conceded,
 11 "I'm not asking you to acquit this man, because he's admitted from that stand that
 12 he was there. He was there, and he's a principal there").

13 **3. Resolution of Claim on Direct Appeal**

14 Petitioner raised this claim on direct appeal. *See Cain*, 10 Cal. 4th at 29-31,
 15 79-80. The California Supreme Court held:

16 The content of defense counsel's statements can be
 17 judged from the following excerpts from his closing guilt
 18 phase argument:

19 'First of all burglary. Did Mr. Cain go in the Galloway
 20 home to steal? Yeah, he did. I said so in my opening
 21 statement, but that wasn't evidence. The evidence was
 22 from his own lips to the police. He stole.

23 What about murder? Is the defendant guilty of murder?
 24 Well, this may surprise you; but in my understanding of
 25 the law, yes, he is. He is guilty of murder. You may
 26 think: Wow, defense lawyer up there and he's giving
 27 away the store. He's not doing his job. He's not
 28 representing Mr. Cain. Well, I disagree with that. I think
 I am representing him, but I'm also not going to dispute
 facts that are not in dispute. Mr. Holmes [the prosecutor]
 is correct. If he's engaged in a felony inherently

1 dangerous to human life and somebody dies, each
2 participant is guilty of murder.

3 I'm not saying and I won't say that the evidence is Tracy
4 Cain killed anybody. My goodness. That's a big
5 difference, and I tend [sic: intend] to stress that this
6 afternoon.

7 I submit the evidence is not Tracy Cain personally killed
8 anybody; but I also submit ladies and gentlemen, that you
9 don't even get to that part when you're talking about the
10 murder. That's the special circumstance, but the murder—
11 Is he guilty of murder? The law is clear. He did
12 something wrong, and that's burglary. That's a given.
And somebody died during that. So it's a given. He's
guilty. And he's guilty of murder.' . . .

13 Defendant also appears to argue his counsel's
14 concessions were an incompetent tactical choice. We
15 disagree. Defendant admitted to the police on tape he
16 was inside the victims' residence when they were
17 murdered and he entered the residence with the intent to
18 steal money. His taped statement was played to the jury.
19 Defendant's admission that he entered the residence for
20 the purpose of stealing money proved his specific intent
21 to commit burglary. Under the felony-murder rule, his
22 commission of burglary, together with the killing of
23 the victims in the commission of the burglary, made him
liable for murder. Under these circumstances, we cannot
conclude counsel was ineffective for candidly admitting
defendant's guilt on these counts, while vigorously
arguing against defendant's guilt of the special
circumstances.

24 *Cain*, 10 Cal. 4th at 30 n.4, 31 (citations omitted).

25 **4. Analysis**

26 Here, Petitioner confessed during police questioning that he went into the
27 Galloways' house and was present at the time of the murders and theft. (Pet. Ex.
28 177 at 00528, 00535-36, 00538-41, 00547-48.) He admitted that he "wanted to get

1 some money” (*Id.* at 00535.) At one point in the interrogation, Petitioner
 2 appears to have admitted that he hit or touched Mr. or Mrs. Galloway. (*Id.* at
 3 00538.) Petitioner confessed that he returned to the house the next day to wipe
 4 away fingerprints. (*Id.* at 00534, 00542-45.)

5 In the face of these confessions, counsel conceded in his guilt-phase opening
 6 argument that Petitioner was guilty of burglary.⁹ (19 RT 5214.) He maintained,
 7 however, that Petitioner “did not inflict blows on Mr. Galloway or Mrs. Galloway”
 8 and did not kill them. (*Id.* at 5214-16.) In his guilt-phase closing argument,
 9 counsel acknowledged that Petitioner was guilty of felony murder. (23 RT 6115.)
 10 As the California Supreme Court held, Petitioner’s “admission that he entered the
 11 residence for the purpose of stealing money proved his specific intent to commit
 12 burglary. Under the felony-murder rule, his commission of burglary, together with
 13 the killing of the victims in the commission of the burglary, made him liable for
 14 murder.” *Cain*, 10 Cal. 4th at 31 (citations omitted). It was in that context that
 15 counsel told the jury that Petitioner was “a ‘bad guy’” who should be convicted
 16 “for ‘what he has done,’” namely, burglary, not premeditated murder. (Pet. at 168
 17 ¶ 439, 180 ¶ 470; *see also* 23 RT 6149-50 (“It has to be on evidence and the special
 18 circumstance that he [] either was the actual killer or he intended to kill. . . . I hope
 19 you don’t fall into the trap . . . to let it slop over. Yeah, he’s a bad guy. He did
 20 something wrong. He’s guilty of burglary. He’s guilty of felony murder. . . .
 21 Convict him for what he did, not for what you think he might have done”).)

22 Counsel repeatedly argued that Petitioner was not the actual killer and did
 23 not intend for the victims to be killed, and that the jury could not find true the
 24 alleged special circumstances on that basis. (23 RT 6116, 6131-33, 6145, 6149-
 25 _____)

26 ⁹ Petitioner’s allegation that counsel conceded during opening argument “that he had a ‘strong
 27 suspicion’ that Mr. Cain was the actual killer” (Pet. at 168 ¶ 438) is misplaced. It was during
 28 closing, not opening, argument that counsel asserted that while there was “probably [a] strong
 suspicion” that Petitioner killed the Galloways, that suspicion did not rise to the necessary level of
 proof beyond a reasonable doubt. (23 RT 6145.)

50.) As in *Visciotti*, counsel’s arguments that the murders were not premeditated likewise furthered his penalty-phase arguments against imposition of the death penalty. By giving the jury reason to believe that “[i]f there’s not an issue in dispute, I’m not going to dispute it,” (23 RT 6110), counsel preserved his credibility in challenging the contested issues and “in urging leniency during the penalty phase.” *Nixon*, 543 U.S. at 181. The state high court was, therefore, not unreasonable in holding that “[u]nder these circumstances, we cannot conclude counsel was ineffective for candidly admitting defendant’s guilt on these counts, while vigorously arguing against defendant’s guilt of the special circumstances.” *Cain*, 10 Cal. 4th at 31 (citations omitted).

C. Penalty-Phase Arguments

1. Allegations

Petitioner argues it was ineffective assistance for counsel, during his penalty-phase opening statement, to state that Petitioner “had done ‘bad and terrible things’ in his life.” (Pet. at 122 ¶ 283 (citing RT 6542).) He also alleges counsel was ineffective during penalty-phase closing argument for stating “no less than ten times either that there was ‘no excuse’ for Mr. Cain’s conduct, or similarly that it was ‘inexcusable’” (*id.* at 122 ¶ 283, 133 ¶ 315 (citing RT 6813, 6815, 6821, 6823, 6848)); presenting “a scenario of the crime that depicted Mr. Cain as the actual killer of the Galloways” (*id.* at 122 ¶ 283, 133 ¶ 315 (citing RT 6818)); and “[a]ffirming the correctness of the jury’s decision to return a guilty verdict stating, ‘I don’t think that it’s a decision that you arrived at lightly. I think you weighed all of the evidence, and I submit that it was a decision that you arrived at after careful deliberation of that evidence’” (*id.* at 123 ¶ 283, 133 ¶ 315 (citing RT 6812)).

2. Legal Standard regarding Penalty-Phase Arguments

“An attorney’s decision to concede guilt in the sentencing phase of a trial is not necessarily an unreasonable tactical decision. When the evidence against a defendant in a capital case is overwhelming and counsel concedes guilt in an effort

1 to avoid the death penalty, ‘counsel cannot be deemed ineffective for attempting to
2 impress the jury with his candor[.]’” *Stenson v. Lambert*, 504 F.3d 873, 890 (9th
3 Cir. 2007) (holding counsel was not ineffective for acknowledging in penalty
4 opening statement that the defense accepted the verdict without reservation and
5 understood it was supported by the evidence) (quoting *Florida v. Nixon*, 543 U.S.
6 175, 192 (2004)). In *Stenson*, the Ninth Circuit agreed with the district court that
7 “the jury might have reacted ‘positively’ to [counsel’s] decision to concede guilt in
8 the penalty phase ‘because it showed that [counsel] and [defendant] respected . . .
9 the jury’s finding, thereby gaining credibility with the jury.’” 504 F.3d at 891; *see*
10 *also Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000) (holding same).

11 Counsel “may even concede that the jury would be justified in imposing the
12 death penalty, in order to establish credibility with the jury.” *Carter v. Johnson*,
13 131 F.3d 452, 466 (5th Cir. 1997) (holding penalty-phase closing argument was
14 not ineffective where counsel urged the jury to return life imprisonment rather than
15 death, while implying that defendant may have committed other crimes,
16 questioning whether death was a worse punishment, and conceding that jury could
17 sentence death with a clear conscience); *see also Riley v. Cockrell*, 339 F.3d 308,
18 315-17 (5th Cir. 2003) (holding same, despite counsel’s comment that “I’m not
19 asking you to look at mitigation. It’s not – not there. Wouldn’t lie to you,”
20 because counsel sought credibility with jury and greater emphasis on future
21 dangerousness, and argued that justice demanded a life sentence rather than death).
22 More specifically, counsel may reasonably concede the truth of the aggravating
23 factors alleged. *Windom v. McNeil*, 578 F.3d 1227 (11th Cir. 2009) (finding no
24 deficient performance or prejudice in counsel’s opening and closing penalty
25 arguments); *Brown v. Dixon*, 891 F.2d 490, 499 (4th Cir. 1989); *see also Hooker*
26 *v. Mullin*, 293 F.3d 1232, 1247 (10th Cir. 2002) (holding counsel was not
27 ineffective in penalty-phase closing argument for conceding that photographs in
28 evidence were “especially heinous, atrocious and cruel by any stretch of the

1 imagination,” “referring to some of the negative aspects of [defendant’s] prior
 2 convictions,” and “acknowledg[ing] [defendant] previously killed his best friend
 3 . . . to retain credibility with the jurors”).

4 **3. Resolution of Claim on Direct Appeal**

5 Petitioner raised this claim on direct appeal. *See Cain*, 10 Cal. 4th at 29-31,
 6 79-80. The California Supreme Court reasoned:

7 Defendant [] complains of a single sentence in counsel’s
 8 argument on premeditation that defendant interprets as a
 9 concession he was the actual killer.[] After describing a
 10 premeditated execution-style killing, counsel argued:
 11 ‘That’s a far cry from a person who is so drug-impaired,
 12 he goes in there, stumbles around trying to get some
 13 money, and he acts in a rage reaction because that’s what
 14 happened.’ In context, and in light of counsel’s express
 15 reminder defendant has ‘denied that [he was the killer] all
 16 the way through,’ and counsel’s urging that the evidence
 17 left room for lingering doubt, the remark is more
 18 reasonably understood as urging the jury to consider the
 19 mitigating circumstances of the killings even if they
 20 believed defendant committed them. Such an argument
 21 was proper, indeed unavoidable, in light of the guilt
 22 phase verdicts, which strongly indicated the jurors
 23 accepted the prosecution theory defendant was the actual
 24 killer.

25 *Id.* at 80, 80 n.33.

26 That reasoning was consistent with the court’s holding regarding another
 27 statement by counsel in penalty-phase closing argument, that “[t]hat makes this
 28 case not excusable, *but certainly not as bad as some of these others.*’ . . .

Counsel’s line of argument, while ultimately unsuccessful, was reasonable and
 clear. The jurors could not have failed to understand he was arguing lack of
 premeditation and deliberation was a mitigating circumstance of the crimes.” *Id.* at
 79-80 (emphasis in original).

4. Analysis

1 The state high court was not unreasonable in determining, as the courts did
 2 in *Stenson* and *Fox*, that counsel's respectful treatment of the jury's verdict was not
 3 ineffective or prejudicial. Similarly, the court may have reasonably concluded that
 4 counsel's acknowledgment that Petitioner "had done 'bad and terrible things' in his
 5 life" was not ineffective or prejudicial in light of the jury's verdict and the
 6 prosecution's aggravating evidence. (Pet. at 122 ¶ 283 (citing 25 RT 6542); *see*
 7 *also* 25 RT 6819-23 (attacking evidence offered in aggravation)); *Windom*, 578
 8 F.3d at 1246 (holding counsel may reasonably concede aggravating factors);
 9 *Brown v. Dixon*, 891 F.2d at 499 (same); *Hooker*, 293 F.3d at 1247 (holding
 10 counsel was not ineffective for "referring to some of the negative aspects of
 11 [defendant's] prior convictions" and "acknowledg[ing] [defendant] previously
 12 killed his best friend . . . to retain credibility with the jurors").

13 The court could have reasonably held that, in context, counsel's "scenario"
 14 depicting Petitioner as the killer served to argue that even though the jury found
 15 either that Petitioner was the killer or intended to kill, the circumstances of the
 16 murders were "a far cry" from those of premeditated, more "abhorrent" murders
 17 that might warrant the death penalty. (25 RT 6818.) Likewise, the court could
 18 have taken counsel's statements that he was "not going to excuse inexcusable
 19 conduct" to be another effort to distinguish the instant murders from deliberate,
 20 premeditated murder. Counsel argued:

21 You can't excuse inexcusable conduct. He should be
 22 punished for what he did, yes. Yes, he should, and that's
 23 the decision that you have to make is what is the
 24 appropriate proper punishment. Not as an excuse. . . . I
 25 could never come up with an excuse for a deliberate
 26 killing. That doesn't exist. What you have to do is
 27 determine whether or not this killing is the type of killing
 28 and this person is the type of person that should be
 executed or should he spend the rest of his life in jail.

(*Id.* at 6813-14; *see also id.* at 6823.) In light of the jury's verdict, the court was

1 not unreasonable in holding that counsel's effort to distinguish these murders from
2 others that could deserve death as punishment was not ineffective or prejudicial.
3 *See Carter*, 131 F.3d at 466.

4 The California Supreme Court's denial of Petitioner's claim of ineffective
5 assistance of counsel in penalty-phase arguments was, therefore, not an
6 unreasonable application of Supreme Court precedent.

7 **D. Admissions Made Without Petitioner's Consent**

8 Finally, Petitioner alleges the "admissions of guilt, and characterizations of
9 Cain's conduct, were made without Cain's prior knowledge, and without his
10 consent." (Pet. at 229 ¶ 607; Mot. at 17.) First, as a matter of law, in the penalty
11 phase and "even during the guilt phase, an attorney is not required to obtain a
12 defendant's 'affirmative, explicit acceptance' of his strategy, so long as the
13 attorney continues to 'function in [a] meaningful sense as the Government's
14 adversary.'" *Stenson*, 504 F.3d at 891 (quoting *Nixon*, 543 U.S. at 188, 190);
15 *compare United States v. Thomas*, 417 F.3d 1053, 1056 (9th Cir. 2005)
16 ("assum[ing] that counsel's concession of guilt without consultation or consent is
17 deficient," and finding no prejudice). As discussed above (*supra* pp. 44-46), the
18 California Supreme Court would not have been unreasonable in holding that
19 counsel subjected the prosecution's case to meaningful adversarial testing in both
20 guilt- and penalty-phase opening and closing arguments.

21 Second, the court may have reasonably determined that Petitioner's
22 conclusory and unsupported allegation fails to establish that counsel did not inform
23 him of the strategy or seek his consent. Petitioner did not provide a declaration in
24 support of his claim, nor did he provide a declaration from trial counsel. He did
25 not personally verify the allegations in his Petition; the Petition is verified only by
26 habeas counsel. Petitioner does not even suggest that he would provide his own
27 testimony at the evidentiary hearing in support of this claim. (*Compare* Mot. at 24,
28 64 ("Petitioner intends to submit evidence on this claim at a hearing through . . .

1 the testimony of . . . , if necessary, Petitioner”) *with* Mot. at 17 (no such proposal).)
 2 Similarly, Petitioner does not allege, for example, what strategies, if any, counsel
 3 did discuss with him or how frequently or infrequently he met with counsel before
 4 trial. The state high court would not have been unreasonable in finding
 5 Petitioner’s claim that the admissions were made without his knowledge or consent
 6 to be without merit.

7 The court’s resolution of these claims was not unreasonable. Claims 2(2)
 8 and 2(14) as to guilt- and penalty-phase concessions, and Claim 10(1) are denied.

9 **XII. Claim 2(7)**

10 In Claim 2(7), Petitioner alleges trial counsel was ineffective for failing to
 11 conduct an adequate investigation into “many critical issues, including but not
 12 limited to Mr. Cain’s competency to provide a knowing and intelligent waiver of
 13 his right to counsel.” (Pet. at 178 ¶ 460.) The Petition makes no other allegations
 14 in support of the claim. Petitioner’s Motion adds only that:

15 significant evidence pre-dating trial [] was available to
 16 document that Cain suffers from organic brain damage,
 17 borderline mental retardation, mental impairments in the
 18 moderately severe range and learning disabilities, and is
 19 incapable of processing verbal information and
 20 accusation, particularly in a high stress environment such
 21 as an interrogation by police officers employing coercive
 tactics subjecting him to duress in order to obtain a
 confession.

22 (Mot. at 68-69.)

23 Petitioner fails to specify in what ways police officers “employ[ed] coercive
 24 tactics.” (*Id.*) Petitioner must establish coercive police conduct to be entitled to
 25 relief. “The sole concern of the Fifth amendment, on which *Miranda* was based, is
 26 governmental coercion. . . . The voluntariness of a waiver of this privilege has
 27 always depended on the absence of police overreaching, not on ‘free choice’ in any
 28 broader sense of the word.” *Colorado v. Connelly*, 479 U.S. 157, 170 (1986)

1 (holding petitioner’s “perception of coercion flowing from the ‘voice of God’ . . .
2 is a matter to which the United States Constitution does not speak”); *California v.*
3 *Kelly*, 51 Cal. 3d 931, 951 (1990) (applying *Connelly* on direct appeal and holding
4 that “defendant’s low intelligence and psychiatric symptoms, standing alone, do
5 not render his waiver of *Miranda* rights involuntary”).

6 Thus, without alleging specific facts to establish police overreaching,
7 Petitioner cannot demonstrate that counsel reasonably likely could have prevailed
8 had he made a motion to exclude Petitioner’s statement. *See Jones*, 66 F.3d at 204
9 (“[C]onclusory allegations which are not supported by a statement of specific facts
10 do not warrant habeas relief” (internal quotation omitted)); *Juan H.*, 408 F.3d at
11 1273 (“trial counsel cannot have been ineffective for failing to raise a meritless
12 objection”); *Wilson*, 185 F.3d at 990 (“To show prejudice under *Strickland* from
13 failure to file a motion,” petitioner must show, in part, that “had his counsel filed
14 the motion, it is reasonable that the trial court would have granted it as
15 meritorious”); *Molina*, 934 F.2d at 1447 (holding that because evidence was
16 admissible, “the decision not to file a motion to suppress it was not prejudicial. . . .
17 [I]t is not professionally unreasonable to decide not to file a motion so clearly
18 lacking in merit”). The California Supreme Court may have reasonably concluded
19 that since a motion to exclude the statement would not reasonably likely have
20 succeeded for the lack of police coercion, Petitioner was not prejudiced by any
21 error of trial counsel in not investigating his mental health at the time he waived
22 his *Miranda* rights. *See Strickland*, 466 U.S. at 694 (“defendant must show that
23 there is a reasonable probability that, but for counsel’s unprofessional errors, the
24 result of the proceeding would have been different”).

25 Petitioner has, therefore, failed to allege facts that, if proved, could entitle
26 him to relief in Claim 2(7). The California Supreme Court’s rejection of this claim
27 was not an unreasonable application of Supreme Court precedent. Accordingly,
28 Claim 2(7) is denied.

**XIII. Claims 2(12), 2(17), and 10(13) as to Footprints, Cerda's Presence, and
Petitioner's Leadership Capacity**

In portions of Claims 2(12), 2(17), and 10(13), Petitioner alleges counsel was ineffective for failing to present additional evidence regarding the timing of the bloody footprints found in the Galloways' home, Cerda's presence in the home, and Petitioner's ability to be the leader of any group that committed the crimes. (Pet. at 98-99 ¶¶ 208-11, 179 ¶¶ 465-67, 181 ¶ 474 ("defense counsel's failure to present the significant evidence rebutting the prosecution's contention that Mr. Cain alone entered the house"); Mot. at 70-71, 75.)

Petitioner's claims are founded upon the misconception that "[t]he jury could only convict Cain of first degree murder and find all of the special circumstances true if it believed Mendoza's testimony and the prosecutor's theory that Cain alone entered the house." (Mot. at 70.) In actuality, as the California Supreme Court observed, the jury could convict Petitioner of first degree murder and find the special circumstances true if it believed Petitioner intended to kill the Galloways, even if someone else was also in the house and Petitioner was not the actual killer. *See Cain*, 10 Cal. 4th at 51; (Pet. Ex. 177 at 00528, 00535-36, 00538-41, 00547-48 (Petitioner's admission that he was in the house at the time of the murders); *see also* 23 RT 6169 (prosecution's statement in closing that "[e]ven if [Cain] isn't the killer, if he went in there and two people were killed, that multiple murder special circumstance is true").)

A. Footprints

Regarding the bloody footprints, Petitioner argues that the prosecution's theory that he alone entered the house "required proof that the bloody footprints of other individuals were made significantly after the crimes" (Mot. at 70.) Expert testimony at trial established a window of time after the crimes were committed when the pool of blood would have been wet enough to form footprints, without showing a disturbance. Petitioner claims that the prosecutor argued that

1 the footprints were created when other individuals went into the house the
2 following morning, still during that window of time. Petitioner argues that trial
3 counsel should have presented certain evidence that others did not enter the house
4 until after the window of time had closed, and that the footprints therefore must
5 have been made at the time of the crimes. Specifically, Petitioner contends that
6 trial counsel was ineffective for failing to present the testimony of nine- and ten-
7 year-old Tammy and Jennifer O'Neil, who reported hearing voices inside the house
8 the day after the murders.

9 Petitioner argues:

10 The prosecution presented evidence that the crimes
11 occurred around midnight on Friday, October 17, 1986.
12 (RT 5482:26-5485:15.) As previously noted, the
13 uncontested expert testimony was that the bloody
14 footprints at the crime scene *not* belonging to Cain were
15 left when the blood was still wet, which had to be 8 hours
16 or less after the murders. (RT 5581:3-5582:11.)
17 Therefore, the prosecutor asserted in closing argument
18 that these footprints were made at 9:00 a.m. the next day,
19 when other individuals went in to view the scene. (RT
20 6057:26-6059:6.) According to evidence that Mr. Cain's
21 counsel possessed but did not present at trial, the
22 individuals did not enter the house until noon the next
23 day, long after the blood would have dried. (Statements
24 by Tammy and Jennifer O'Neil, in . . . Exhibit 103, and
25 Selected Documents From Trial Files, Exhibits 99-101.)
26 Accordingly, footprints not belonging to Cain *had* to be
27 made at the time of the crime.

28 (Pet. at 98 ¶¶ 208-09 (emphasis in original).) Tammy and Jennifer O'Neil told
police they heard whispering inside the Galloway home when they rang the
doorbell between 11:00 and 11:25 a.m. on Saturday, selling calendars. (Pet. Ex.
103.) The evidence was not presented at trial.

Defense counsel nevertheless succeeded at trial in casting significant doubt
on the possibility that the others' footprints were made after the time of the crimes.

1 As Petitioner acknowledges, the prosecution “presented evidence that the murders
2 occurred around midnight . . . [and] asserted in closing argument that these
3 footprints were made at 9:00 a.m.,” (Pet. at 98 ¶ 208), a span of roughly nine hours.
4 Counsel established that the window of time when the footprints could have been
5 made was likely only six hours after the murders. (*See* 20 RT 5581, 5591.)
6 Through counsel’s cross-examination, the expert testified that if the footprints had
7 been made six or more hours later, he would expect to see a disturbance in the pool
8 of blood that was tracked in the footprints, and no disturbance was present. (*Id.* at
9 5591.) Counsel emphasized this point in closing argument. (23 RT 6144.) Indeed,
10 the prosecutor acknowledged that the footprints in some way supported
11 Petitioner’s claim that he did not kill the Galloways, calling the footprints
12 “ambiguous support.” (22 RT 6057-59.)

13 The extent to which the O’Neils’ testimony could have provided additional
14 support for Petitioner’s defense cannot be determined without an evidentiary
15 hearing. *See Earp*, 431 F.3d at 1173. While Petitioner concedes that counsel
16 “possessed” the evidence, it is unclear whether counsel interviewed or otherwise
17 investigated the O’Neils, and whether he made a strategic decision not to present
18 their testimony. Likewise, the nature and weight of any testimony the O’Neils
19 could have given cannot be determined on the face of the documents Petitioner
20 provides. Accordingly, the Court will include Claims 2(12), 2(17), and 10(13) as
21 to Tammy and Jennifer O’Neil within the scope of the evidentiary hearing.

22 **B. Cerda’s Presence**

23 The California Supreme Court may have reasonably determined that
24 Petitioner failed to allege facts to demonstrate prejudice from counsel’s alleged
25 failure to present evidence regarding Cerda’s presence in the house. Petitioner
26 asserts that trial counsel should have presented evidence from Dale Rodabaugh.
27 (Pet. at 98-99 ¶ 210, 163 ¶ 429(a).) Rodabaugh, an inmate housed with Cerda at
28 the Ventura County jail, told police that Cerda told him that he went inside the

1 Galloways' house to help Petitioner "with the intent of causing damage to the
 2 victims because he had heard [Petitioner] yell something." (Pet. Ex. 103.) Cerda
 3 purportedly told Rodabaugh that once he entered the house "he saw that both
 4 victims were dead at which time [Petitioner] and he ran." (*Id.*)

5 The California Supreme Court may have reasonably concluded, as this Court
 6 did in its September 2002 Order, that "[a]t best, the Rodabaugh testimony could
 7 only establish that Cerda was present in the Galloway house *after* the murders had
 8 been committed" (Order re Pet'r's Outstanding Discovery Requests, Sept. 24,
 9 2002, at 19 (emphasis added).) The court may have reasoned that Rodabaugh's
 10 testimony could not have strengthened Petitioner's defense and could have
 11 weakened it. Accordingly, the court's determination that Petitioner failed to
 12 present any evidence that adequate counsel should have presented at trial, or to
 13 allege facts showing a reasonable likelihood of a different outcome at trial would
 14 not have been an unreasonable application of Supreme Court precedent. Claims
 15 2(12), 2(17), and 10(13) as to Cerda's presence in the Galloways' house are
 16 denied.

17 **C. Petitioner's Leadership**

18 Finally, regarding Petitioner's capacity to be the leader of a group that
 19 committed the crimes, Petitioner alleges trial counsel failed to present evidence
 20 that Petitioner "suffered from organic brain damage, learning disabilities, and
 21 border-line retardation" that rendered him unable to be such a leader. (Mot. at 70;
 22 Pet. at 99 ¶ 211 (citing Pet. Exs. 169-172), 163 ¶ 429(b).) Petitioner argues that
 23 Petitioner's leadership status was "of paramount importance to the prosecution's
 24 theory that Cain alone committed the crimes." (Mot. at 70.) Petitioner also alleges
 25 that the prosecution's theory required "proof that the mentally impaired Cain was a
 26 'leader' who could coerce Cerda into helping lift the garage door and threaten
 27 Mendoza into helping him dispose of the stolen property." (*Id.* at 70-71.)

28 As the Court observed in its September 2002 Order:

1 “At trial the parties stipulated to the ages of the individuals at the party at the
2 Cain house on the night of the murders, who arguably had some knowledge of the
3 murders. Petitioner, who was almost twenty-four years old, was the oldest of the
4 group, with the others ranging in age from seventeen to twenty-two. In his closing
5 argument the prosecutor argued that if there was a leader of the group, it would
6 have to be Petitioner. He pointed out that the group always met at the Cain house,
7 that Petitioner initiated the group’s shopping excursion, and that physically he was
8 the strongest, as well as the most aggressive. RT 6061-63.

9 Trial counsel attempted to refute the prosecutor’s theory that Petitioner was
10 the leader, pointing out that neither age nor physical size would establish
11 leadership of the group. RT 6134. He also argued that Petitioner was relatively
12 new to the Oxnard area, and there was no evidence that people looked up to
13 Petitioner as a leader. RT 6134-35. Trial counsel had already been advised by Dr.
14 Theodore S. Donaldson, Ph.D., a clinical psychologist, that there were no
15 psychological issues that would bear on the legal issues in Petitioner’s case.”
16 (Order re Pet’r’s Outstanding Discovery Requests, Sept. 24, 2002, at 20-21.)

17 As the Court has held, it is a reasonable conclusion that the appointment of
18 Dr. Donaldson was not an adverse effect arising from a conflict of interest. (*See*
19 *supra* pp. 43-44; Order re Pet’r’s Outstanding Discovery Requests, Sept. 24, 2002,
20 at 17-18.) For that reason, this Court held that “it is highly unlikely that the
21 alleged conflict of interest resulted in trial counsel foregoing the presentation of
22 evidence that would have established that Petitioner could not have been the leader
23” (*Id.* at 21.)

24 However, “whether trial counsel’s performance with respect to the retention
25 of Dr. Donaldson was constitutionally adequate” has not been resolved. (*Id.* at 24;
26 *see infra* p. 106.) Petitioner presents declarations from other mental health experts
27 to support his claim that defense counsel failed to present available evidence
28 regarding his lack of leadership capacity. (*See* Pet. at 99 ¶ 211 (citing Pet. Exs.

1 169-172).) The reports by psychiatrist Jay Jackman, M.D., and clinical
 2 psychologist Karen Bronk Froming, Ph.D., include notations that Petitioner's
 3 sixth-grade teacher observed that Petitioner was "[a] leader, but of those who are
 4 'losers.'" (Pet. Ex. 169 ¶ 32; Pet. Ex. 170 ¶ 38.) Drs. Jackman and Froming
 5 express no other explicit information or opinions regarding Petitioner's leadership
 6 capability. Dr. Donaldson, a clinical psychologist, declared in 1998 that he agreed
 7 with the conclusions reached by Dr. Jackman. (Pet. Ex. 172 ¶ 16.)

8 The report by clinical psychologist Ruth Zitner, Psy.D., contains the same
 9 observation by Petitioner's sixth-grade teacher (Pet. Ex. 171 at 25 ¶ 44), but
 10 ultimately concludes that Petitioner's difficulties "impair his leadership
 11 capabilities, making him more apt to be a follower." (*Id.* at 64 ¶ 117.) Dr. Zitner
 12 refers to Petitioner's "extensive neurological impairments in academics, memory,
 13 attention, problem solving, conceptualizing, as well as motor difficulties, . . .
 14 severe enough to put him in the moderate range of global impairment [and] . . .
 15 reflected in Tracy's difficulties navigating the world." (*Id.* at 63 ¶ 117.) She
 16 reports that Petitioner "has difficulty integrating complex data, and typically reacts
 17 impulsively to frustration." (*Id.* at 63-64 ¶ 117.) Dr. Zitner opines that Petitioner's
 18 deficits impair his leadership ability, and that he "lacks both the intelligence and
 19 the charisma to be a leader" (*Id.* at 64-65 ¶ 117.)

20 **1. Claims 2(12) and 2(17)**

21 In Claims 2(12) and 2(17), Petitioner argues trial counsel was ineffective for
 22 failing to present expert testimony regarding his lack of leadership capacity at the
 23 guilt phase of trial. The California Supreme Court could have reasonably
 24 determined, however, that such evidence was inadmissible at the guilt phase of
 25 trial. As the state high court observed in *California v. Saille*, legislative changes to
 26 the California Penal Code in 1981 "limited psychiatric testimony" admissible in
 27 the guilt phase. 54 Cal. 3d 1103, 1111 (1991). The legislature added California
 28 Penal Code § 28 that provided, as amended in 1982 and as it does now, that

1 “[e]vidence of mental disease, mental defect, or mental disorder shall not be
2 admitted to show or negate the capacity to form any mental state,” but is
3 “admissible solely on the issue of whether or not the accused actually formed a
4 required specific intent, premeditated, deliberated, or harbored malice aforethought
5” Cal. Penal Code § 28. The California Supreme Court could have reasonably
6 concluded that whether Petitioner could have been the leader of the group was a
7 distinct issue from whether Petitioner actually formed a required specific intent,
8 premeditated, deliberated, or harbored malice aforethought. The court could have
9 determined, therefore, that Section 28 would have barred the admission of such
10 mental health evidence, and thus that trial counsel could not have been ineffective
11 for failing to present it. *See Juan H.*, 408 F.3d at 1273; *Molina*, 934 F.2d at 1447;
12 *see also Fretwell*, 506 U.S. at 370. Accordingly, this portion of Claims 2(12) and
13 2(17) is denied.

14 **2. Claim 10(13)**

15 In Claim 10(13) (in part), Petitioner argues that counsel failed to present
16 such evidence at the penalty phase of trial, to support a lingering doubt argument in
17 mitigation. Without further development of the record, it is impossible to
18 determine what effect, if any, counsel’s presentation of expert testimony that
19 Petitioner could not have been the leader may have had on Petitioner’s penalty-
20 phase trial. *See Earp*, 431 F.3d at 1173; *Bonin v. Calderon*, 59 F.3d 815, 834 (9th
21 Cir. 1995) (holding that when a petitioner claims that defense counsel failed to
22 present evidence in mitigation, “in order to determine whether [counsel’s actions] .
23 . . might have affected the jury’s decision, it is essential to compare the evidence
24 that actually was presented to the jury with the evidence that might have been
25 presented had counsel acted differently”). Accordingly, Claim 10(13) as to
26 Petitioner’s leadership capacity shall be included within the scope of the
27 evidentiary hearing.
28

XIV. Claims 10(5), 10(7), 10(12), and 2(13), and Claims 2(14) and 2(17) as to Diminished Capacity Defense

In Claims 10(5) and 10(7), Petitioner alleges counsel was ineffective at the penalty phase because he did not attempt to bar the special circumstance instruction and finding regarding attempted rape, and its consideration as an aggravating factor. (Mot. at 20, 23; Pet. at 233 ¶ 621 (incorporating Third Claim for Relief), 234 ¶ 627.) In Claim 10(5), Petitioner incorporates the allegation that the jury, through counsel's efforts, should have been instructed on "the availability of intoxication as a defense" to the attempted rape special circumstance allegation. (Pet. at 203 ¶ 527, 233 ¶ 621.)

The foundation of Petitioner's claims is that the jury was "instructed on and consider[ed] a special circumstance finding of attempted rape when Cain had never even been charged with attempted rape." (Mot. at 20.) The crime of attempted rape required, as it does today, a specific intent not required for the crime of rape. *Osband*, 13 Cal. 4th at 692 ("An attempt was defined, at the time defendant attacked [the victim in October 1985], as an intent to commit a crime coupled with a direct but ineffectual act toward its commission") (citing *Memro*, 38 Cal. 3d at 698); Cal. Penal Code § 21a, added by Stats. 1986, ch. 519, § 1, p. 1859 (later codifying rule)); *see also* Cal. Penal Code §§ 261, 664. Petitioner argues the lack of notice of the charge "prejudiced Petitioner, since defense counsel could not present a single witness regarding the 'attempted rape' allegation; did not examine any of the witnesses presented on the rape allegation about the possibility of 'attempted rape'; and did not address the 'attempted rape' charge in either the opening or closing arguments." (Pet. at 176 ¶ 454(ii).)¹⁰ However, Petitioner fails

¹⁰ Petitioner makes this argument to support his claim that trial counsel was ineffective at the guilt phase for failing to contest or defend against the attempted rape special circumstance allegation. (Claim 2(5)). Petitioner moves for an evidentiary hearing on the issue only at the penalty phase of trial, not at the guilt phase. Nevertheless, the consideration of the attempted rape special circumstance at the penalty phase could only be the result of ineffective assistance of counsel if

1 to allege any specific facts that adequate counsel could have established at trial had
 2 Petitioner had notice of the attempted rape charge, apart from that of his
 3 intoxication at the time of the crimes. *See United States v. Martin (Wayne)*, 783
 4 F.2d 1449, 1453 (9th Cir. 1986) (finding no constitutional error where counsel was
 5 put on notice of charge weeks before conviction and did not move to reopen the
 6 defense, because “there was in fact no defense to the specific intent element”),
 7 *abrogated on other grounds by Schmuck v. United States*, 489 U.S. 705 (1989); *see*
 8 *also* L.R. 83-17.7(g) (2003) (requiring petitioner to specify factual issues and
 9 evidence to be presented at hearing); Habeas Corpus R. 2(c)(1)-(2) (requiring
 10 petitioner to specify all grounds for relief and supporting facts).

11 Likewise, in Claims 10(12), 2(13), 2(14) in part, and 2(17) in part, on which
 12 Petitioner moves for an evidentiary hearing, Petitioner alleges he was intoxicated
 13 and had diminished capacity at the time of the crimes, and that counsel’s
 14 representation on those issues at both phases of trial was ineffective. (Mot. at 46,
 15 72-76; Pet. at 180 ¶¶ 469-70, 181-82 ¶ 475, 237 ¶ 636.)

16 **A. Background**

17 As the California Supreme Court aptly summarized:

18 “The original information, the first amended information and the second
 19 amended information charged defendant with rape and alleged a special
 20 circumstance of murder while engaged in the commission of rape. The second
 21 amended information pleaded the rape special circumstance as follows: ‘It is
 22 further alleged the murder of Modena Shores Galloway was committed by
 23 defendant, Tracy Cain, while the defendant was engaged in the commission of rape
 24 in violation of Penal Code Section 261, within the meaning of section
 25 190.2(a)(17).’ Section 190.2, subdivision (a)(17) states in relevant part: ‘The

26
 27 counsel’s performance was deficient at the guilt phase. In determining the penalty, the jury
 28 properly takes into account any special circumstances found to be true at the guilt phase. Cal.
 Penal Code § 190.3(a).

1 murder was committed while defendant was engaged in or was an accomplice in
2 the commission of, *attempted commission of*, or the immediate flight after
3 committing or attempting to commit the following felonies: . . . Rape in violation
4 of Section 261.’

5 Following the prosecutor’s rebuttal argument in which the prosecutor
6 stressed a finding of attempted rape was sufficient to find defendant guilty of the
7 rape special circumstance, the trial court raised the issue of whether the
8 information had provided defendant with sufficient notice of the attempted rape
9 basis of the special circumstance. The court stated its inquiry was triggered by the
10 fact the information specifically enumerated attempted robbery in the robbery
11 special circumstance allegation, but did not specifically enumerate attempted rape
12 in the rape special [] circumstance allegation. Under these circumstances, the court
13 wished to ascertain whether defense counsel believed he had been misled. The
14 prosecutor reminded the court he had argued attempted rape in his opening
15 statement^[11] and attempted rape was included in the agreed jury instruction for the
16 special circumstances. Defense counsel stated he was aware of the differences in
17 the language used in the information, but he also was familiar with section 190.2.
18 He was not surprised by the prosecutor’s argument, believed the prosecutor had the
19 right to make the argument, and believed his client was not prejudiced by the
20 prosecutor’s reliance upon attempted rape as a basis for the rape special
21 circumstance.” *Cain*, 10 Cal. 4th at 41-42 (emphasis in original, footnote added).

22 Specifically, trial counsel represented to the court:
23
24

25 ¹¹ The Court notes that the prosecutor’s comment, although not central to the California Supreme
26 Court’s reasoning, is inaccurate. The prosecutor made no reference to attempted rape in his
27 opening argument. To the contrary, the prosecutor consistently argued that Petitioner raped Mrs.
28 Galloway. (9 RT 5199, 5209, 5211, 5213.) Although the prosecutor acknowledged that the
autopsy surgeon was uncertain if a rape occurred because he believed he produced the tear in the
victim’s vagina during examination, the prosecutor nevertheless argued, “There’s evidence far
beyond the tear that shows that a rape took place.” (*Id.* at 5210-11.)

1 “[T]o be quite candid about it, I’ve read Section 190.2 numerous times. I’m
2 aware it says commission or attempted commission. I can’t in good conscience say
3 that I am surprised at this late date. I think it’s clear the entire thrust of the
4 testimony from all the doctors was an actual rape; but since the information is
5 really one of notice – I’m aware of the section. I’m aware how it is plead, and I’m
6 aware of these jury instructions. And I’m not going to sit here and pretend that I’m
7 surprised and I’m going to holler foul at the D.A. at this late time. I’m not going to
8 do that because I’m aware of what – and I know you’re not suggesting it either.
9 You’re just bringing it to our attention that the information appears to be defective
10 at least because it is not explicit. Well, I was aware of it. I was aware and I heard
11 him and I could have objected but I didn’t because I think that he’s entitled to
12 argue under Section 190.2 commission or attempted commission. That’s about as
13 plain as I can put it. I didn’t – I didn’t address it in my – in my argument because
14 of reasons I think are sound. I think that involves a great deal of speculation on the
15 jury. One can have an attempt. That just involves a great deal of conjecture. I
16 didn’t want to go into that whole other topic. I wanted to concentrate solely on the
17 rape because I thought I had a very strong defense witness. But I don’t think Tracy
18 Cain and the defense is prejudiced. Obviously, we’d like to have every count
19 knocked out. . . . Very sensitive to that rape count, but I cannot in good conscience
20 look for that kind of loophole and try to drive through it.” (23 RT 6195-96.)

21 **B. Claims 10(5) and 10(7)**

22 **1. Legal Standard regarding Constitutional Adequacy of**
23 **Notice**

24 As the United States Supreme Court observed:

25 It is the ancient doctrine of both the common law and of
26 our Constitution that a defendant cannot be held to
27 answer a charge not contained in the indictment brought
28 against him. This stricture is based at least in part on the
 right of the defendant to notice of the charge brought

1 against him. Were the prosecutor able to request an
2 instruction on an offense whose elements were not
3 charged in the indictment, this right to notice would be
4 placed in jeopardy.

5 *Schmuck*, 489 U.S. at 717-18 (citations omitted); *see also In re Oliver*, 333 U.S.
6 257 (1948). The Ninth Circuit has held that “a defendant can be adequately
7 notified of the nature and cause of the accusation against him by means other than
8 the charging document.” *Calderon v. Prunty*, 59 F.3d 1005, 1009 (9th Cir. 1995)
9 (finding constitutionally adequate notice where defendant learned of the
10 prosecution’s charges through its opening statement and evidence before the
11 defendant testified).

12 An information’s “mere citation to a statutory section” that lists several
13 possible types of violations does not provide adequate notice of the charge. *Givens*
14 *v. Housewright*, 786 F.2d 1378, 1381 (9th Cir. 1986) (regarding embezzlement,
15 sale, disposal, or receipt of government property); *United States v. Rojo*, 727 F.2d
16 1415, 1418 (9th Cir. 1983) (“The citation did not inform [defendant] which of
17 these violations [forms of first-degree murder] he allegedly committed and he
18 should not have to speculate in this regard”); *cf. Russell v. United States*, 369 U.S.
19 749, 765 (1962) (“the language of the statute may be used in the general
20 description of an offense, but it must be accompanied with such a statement of the
21 facts and circumstances as will inform the accused of the specific offense, coming
22 under the general description, with which he is charged,” “without uncertainty or
23 ambiguity;” “it must state the species – it must descend to particulars” (internal
24 quotations omitted)).

25 Moreover, where counsel “had no occasion to defend against the [crime]
26 during the evidentiary phase of the trial[,] . . . affect[ing] the composition of the
27 record,” and “[d]efense counsel would have added an evidentiary dimension to his
28 defense” with adequate notice, the error cannot be found to be harmless. *Sheppard*
 v. Rees, 909 F.2d 1234, 1237 (9th Cir. 1990). On the other hand, where the

1 defendant is put on notice before conviction that he may be convicted of a specific
 2 intent crime, instead of the general intent crime in the indictment, and defendant
 3 does not seek to present any evidence in opposition, the court may “conclude that
 4 there was in fact no defense to the specific intent element” and no constitutional
 5 violation. *Martin (Wayne)*, 783 F.2d at 1453; *see also United States v. Velasco-*
 6 *Medina*, 305 F.3d 839, 847 (9th Cir. 2002) (finding any defect in the indictment
 7 harmless where defendant concedes trial counsel “was aware of the nature of the
 8 alleged offense and knew that the government needed to prove specific intent”).

9 **2. California Supreme Court Ruling on Direct Appeal**

10 Considering whether Petitioner received sufficient notice of the attempted
 11 rape special circumstance allegation, the California Supreme Court held, “We find
 12 no statutory error in the language used to allege the rape special circumstance.
 13 Although consistency in the form of charging special circumstances is preferable,
 14 the rape special circumstance as alleged satisfactorily ‘charged’ defendant and was
 15 not misleading. (§§ 190.1, subds. (a) & (c), 190.4, subd. (a).) Under the statute,
 16 the rape special circumstance specifically includes that the crime was committed
 17 during the ‘attempted commission of a rape.’ (§ 190.2, subd. (a)(17).) The
 18 information specifically referred to the statute defining the special circumstance.
 19 Under these circumstances, the rape special-circumstance allegation provided the
 20 express notice of the charges against defendant required under state law in a capital
 21 case. . . . Furthermore, since the information was sufficient to provide the required
 22 notice, and defendant’s counsel stated defendant was neither surprised nor
 23 prejudiced by the argument and instructions relating to attempted rape as the basis
 24 of the rape special circumstance, defendant’s constitutional right to notice of the
 25 charges against him was not compromised.” *Cain*, 10 Cal. 4th at 42.

26 The court went on to hold, as to counsel’s performance on the attempted
 27 rape special circumstance, that “because we find neither error nor prejudice,
 28 defendant’s ineffective assistance of counsel claim must be rejected also. We

1 doubt, moreover, whether the principal ‘error’ alleged, i.e., counsel’s failure to
2 claim surprise and prejudice where there was none, could be considered
3 constitutionally deficient performance even if prejudicial. Effective assistance
4 does not require counsel to refrain from frankness and honesty in his or her
5 dealings with the court.” *Id.* at 42 n.17.

6 **3. Analysis**

7 “A state court’s determination that a claim lacks merit precludes federal
8 habeas relief so long as fairminded jurists could disagree on the correctness of the
9 state court’s decision.” *Richter*, 131 S. Ct. at 786 (internal quotation and citation
10 omitted). Here, fairminded jurists could differ about whether Petitioner had
11 adequate notice of the attempted rape special circumstance allegation. Petitioner’s
12 counsel represented to the trial court that he was aware that the prosecutor could
13 argue attempted rape and he did not want to delve into that allegation for strategic
14 reasons. It is true that the adequacy of counsel’s performance, in claiming that he
15 had notice of the attempted rape allegation and in not presenting evidence or
16 argument on the allegation after the court’s inquiry, could be questioned. The
17 California Supreme Court found counsel’s performance to be adequate, however,
18 and even if fairminded jurists could disagree about the correctness of that decision,
19 that does not make it unreasonable. *See id.* at 785-86. Thus, in light of the
20 deference afforded the state high court, this Court concludes that the court was not
21 unreasonable in holding that Petitioner had adequate notice.

22 Independently, as discussed below, the California Supreme Court could have
23 reasonably concluded that trial counsel reasonably relied on expert opinion in not
24 presenting an intoxication or diminished capacity defense, or that Petitioner failed
25 to allege facts to demonstrate any mental state evidence that competent counsel
26 with adequate notice should have presented at trial. Thus, even if the charging
27 document were insufficient, the California Supreme Court could have reasonably
28

1 found any resulting error to be harmless beyond a reasonable doubt. Accordingly,
2 Claims 10(5) and 10(7) are denied.

3 **C. Claims 10(12) and 2(13), and Claims 2(14) and 2(17) as to**
4 **Diminished Capacity Defense**

5 **1. Legal Standard regarding Intoxication and Diminished**
6 **Capacity Defense**

7 In the years prior to Petitioner's offenses and trial, the defense of diminished
8 capacity was abolished, expert witnesses were prohibited from testifying as to
9 whether a defendant possessed a requisite mental state, and evidence of mental
10 illness or intoxication could be introduced only to show whether the defendant
11 "*actually formed* a required specific intent," not whether he or she had "the
12 *capacity* to form [that] mental state." *Saille*, 54 Cal. 3d at 1111-12 (emphasis in
13 original). Nevertheless, a defendant remained "free to show that because of his
14 mental illness or voluntary intoxication, he did not *in fact* form the intent" required
15 for the crime. *Id.* at 1116-17 (emphasis in original).

16 **2. California Supreme Court Ruling**

17 Concerning Petitioner's argument that counsel "did not present 'even a
18 minimally effective argument on the undisputed use of alcohol and drugs on the
19 night in question,'" the court noted on direct appeal that counsel "did briefly argue
20 there was no intent to kill because defendant 'was obviously under the influence of
21 alcohol and drugs.'" *Cain*, 10 Cal. 4th at 52. The court opined that "[b]elaboring
22 this point would have risked appearing to concede defendant was the killer, which
23 would have conflicted with and detracted from counsel's primary argument, that
24 (consistent with his police statement) defendant had not killed anyone, planned to
25 kill anyone or assisted in killing anyone in the burglary." *Id.* While the court
26 recognized that "almost no evidence was presented regarding the quantity and
27 effects of the drugs consumed by defendant on the night of the murders or the
28

1 effect consumption had on defendant,” it did not consider on direct appeal whether
 2 the lack of such evidence at trial was the product of deficient performance. *Id.*

3 The court may have reasonably concluded on habeas review that counsel
 4 reasonably relied on expert opinion in not presenting an intoxication or diminished
 5 capacity defense. Before trial, counsel asked Dr. Donaldson to consider “any
 6 mental state defenses at the guilt phase,” and Dr. Donaldson reported only that
 7 Petitioner denied using any illegal drugs or alcohol in junior high or high school.
 8 (Pet. Exs. 46, 172 ¶ 6.)¹² Trial counsel may reasonably rely on expert opinion in
 9 not presenting a diminished capacity defense. *See Williams v. Woodford*, 384 F.3d
 10 567, 610-11 (9th Cir. 2004) (holding counsel made reasonable strategic choice not
 11 to investigate further or pursue a mental state defense where some experts found no
 12 support for a diminished capacity defense, and one “*noted the possibility*” that
 13 defendant’s mental capacity to form the required specific intent was diminished
 14 from drug use but did not “have sufficient tangible evidence to support that
 15 conclusion;” such evaluations “did not support a mental-state defense”) (internal
 16 quotation omitted, emphasis added); *Hendricks v. Calderon*, 70 F.3d 1032, 1038
 17 (9th Cir. 1995) (“In general, an attorney is entitled to rely on the opinions of
 18 mental health experts in deciding whether to pursue a[] . . . diminished capacity
 19 defense”); *Morgan v. Bunnell*, 24 F.3d 52 (9th Cir. 1994). Similarly, counsel could
 20

21 ¹² The record also indicates that trial counsel retained an expert, Ronald Siegel, Ph.D., to test
 22 samples of Petitioner’s hair for the presence of controlled substances. (See Pet. Ex. 46.) Dr.
 23 Siegel’s report, dated May 9, 1988, states that he interviewed and examined Petitioner on April
 24 17, 1988. Trial counsel delivered his guilt-phase closing argument on April 20, 1988. Dr.
 25 Siegel’s report states, “Prior to the events of October 1986, the defendant reported to me that he
 26 was high on beer and marijuana, but denied recent use of other substances. The analyses of hair
 27 samples indicated no detectable amounts of marijuana, cocaine, or other substances for the past
 28 2.5 years (going back to approximately January 1986). While the defendant may have been
 exposed to marijuana and cocaine prior to October 1986, the amounts were not significant to be
 detected and, as verified by the defendant’s own statements to me, of little behavioral
 consequence. I also feel that his alcohol use prior to the instant offense was of little behavioral
 significance.” (*Id.*) Thus, Dr. Siegel detected no controlled substances and opined that any
 marijuana, cocaine, or alcohol use was of little behavioral significance.

1 have reasonably strategized that casting doubt upon whether Petitioner formed the
2 requisite specific intent would be more effective than attempting to prove
3 Petitioner's intoxication. *See Richter*, 131 S. Ct. at 790 ("To support a defense
4 argument that the prosecution has not proved its case it sometimes is better to try to
5 cast pervasive suspicion of doubt than to strive to prove a certainty that
6 exonerates").

7 In the alternative, and independent to the reasoning above, the court may
8 have reasonably determined that Petitioner failed to allege facts to demonstrate
9 prejudice from any deficient performance by counsel. The evidence of intoxication
10 presented at trial and on habeas review is set forth below.

11 **3. Evidence regarding Petitioner's Mental State at the Time of**
12 **the Offenses**

13 **a. Evidence Presented at Trial**

14 As the Court observed in its June 2003 Order:

15 "[T]he trial record reveals little evidence regarding what Petitioner actually
16 ingested before the commission of the murders.

17 At the party on the evening of the murders there was alcohol and cocaine
18 and marijuana being used. RT 5512-13. Mendoza testified that beers were being
19 drunk one after another, so there was no need to keep them in the refrigerator. RT
20 5514-15. Mendoza testified that he saw Petitioner smoke some cocaine. RT
21 5475-76. But Mendoza explained that Albis, Clements and himself all smoked
22 cocaine at some point on Friday or Saturday, so he wasn't sure of the exact day
23 that he saw Petitioner use cocaine. RT 5476. Clements confirmed that there was
24 beer at the party. RT 5768.

25 Clements said he drank about twelve beers. RT 5769. He testified that
26 everyone was also smoking marijuana, although he clarified that Albis was not.
27 RT 5769. Clements admitted that he was drinking pretty heavily and smoking
28 heavily at the party on Friday night, so the details of the party were a little fuzzy to

1 him. RT 5782-83. Clements testified that it seemed like everyone at the party had
2 a beer in their hand throughout the evening. RT 5783. He testified that there was
3 enough marijuana to go around, RT 5783, but he did not see any cocaine at the
4 party. RT 5784. During an interview with David Stone, an investigator for the
5 Ventura County District Attorney's Office, Clements said he had consumed a six
6 pack of beer at the party. RT 5891. However Clements reported that he was not
7 intoxicated because he had consumed the beer over the entire evening. RT 5891.

8 Rick Albis testified that he did not remember if he drank any beer at the
9 party. RT 5813. Albis said he did not use any cocaine or marijuana on that
10 evening, but he could not remember if anyone else at the party used those
11 substances. RT 5814.

12 Mark Pina ('Pina'), who lived across the street from Petitioner, testified that
13 after 12:30 a.m., on the night of the murders, Petitioner came to his house to buy a
14 free base pipe. RT 5607-09. Pina said that at the time Petitioner looked like 'he'd
15 been doing some cocaine.' RT 5610. However, there was also testimony that
16 Petitioner wanted to buy marijuana on the night of the murders, but was unable to
17 do so because he lacked the funds. RT 5624-25. Petitioner asked Richard Willis
18 ('Willis') if he knew where Petitioner could sell a home entertainment system, so
19 that he could get some money to buy marijuana. RT 5628. Willis testified that he
20 did not sell marijuana or any other illegal substance to Petitioner or Mendoza on
21 that Friday night. RT 5638. Thus, the jury could have inferred that Petitioner was
22 not able to obtain a sufficient amount of marijuana to intoxicate himself.

23 A review of the record evidence adduced at trial shows there was no
24 evidence that Petitioner consumed any specific amount of alcohol or other
25 controlled substances. Nor is there any evidence that his consumption of such
26 substances affected . . . [any] specific intent to kill the Galloways." (Order Re:
27 Respondent's Motion for Judgment on the Pleadings on Claims 4, 5, 6, 7 and 14,
28 June 12, 2003, at 17-18 (internal quotation and citation omitted).)

1 **b. Evidence Presented On Habeas Review**

2 **(1) Lay Witnesses**

3 First, Petitioner relies in part upon testimony from Darnell “Danny” Cain, in
4 an April 1997 declaration, that he talked to Petitioner on the night of the murders
5 and “Tracy sounded high. Normally he is a quiet and reserved person. However,
6 that night he seemed in a more joking, humorous mood. It was similar to the way
7 he used to become when he smoked PCP.” (Pet. Ex. 157 ¶ 13.) Danny declares
8 that he “was never interviewed by any member of Tracy’s defense team” and
9 would have provided this information had he been asked to testify. (*Id.* ¶ 14.) A
10 transcript of a May 1987 interview of Danny by Petitioner’s trial counsel and
11 investigator, however, contradicts those statements. (*See* Pet. Ex. 20.) In that
12 interview, Danny said that when Wilma Cain told him about the accusations
13 against Petitioner, “the first thing that registered in my mind is that the man must
14 have been out of his mind. The first thing, if he did it, is exactly why I said – if he
15 did it, he was on dope. He was out of his mind. He wasn’t hisself ’cause that’s not
16 Tracy. My mom [Wilma] say, ‘I agree totally.’” (*Id.* at 34.) Danny said that he
17 had seen Petitioner high on marijuana, when he would be “pretty mellow,” and had
18 never seen Petitioner high on cocaine, sherms, or PCP. (*Id.* at 47-48.) He said
19 Petitioner “wouldn’t mess with that type of stuff around me.” (*Id.* at 48.) He
20 reported that Petitioner’s father told him that Petitioner was using cocaine and
21 drinking. (Pet. Ex. 20 at 16.)

22 Petitioner also presents statements from Val Cain, Cerda, and Clements. In
23 an interview with Petitioner’s investigator, Val said that he was “pretty drunk” at
24 the party, but he did not see any cocaine that night. (Pet. Ex. 57 at 6-7.) Val said
25 that Petitioner “was drinking,” and he implied that Petitioner was smoking
26 marijuana. (*Id.* at 7.) Cerda declared that he, Petitioner, and others at the party
27 “spent the night smoking weed and drinking beer.” (Pet. Ex. 160 at 1.) Clements
28 declared the same, as he testified at trial. (Pet. Ex. 162 at 1.)

1 Additionally, Petitioner presents police interviews with Mark Pina and Rick
2 Albis. As he testified at trial, Pina said that early in the morning of the murders,
3 Petitioner asked for and got a freebasing pipe from him. (Pet. Ex. 103.) Pina said
4 that Petitioner looked “sprung,” or high, from “‘basing’ (smoking cocaine) or
5 smoking ‘primos’ (marijuana). In his opinion, Tracy was out of it. He was talking
6 fast and he was talking thick.” (*Id.*) Albis said in his police interview that
7 Petitioner and Mendoza asked to borrow money from him to buy cocaine. Albis
8 told police that after he loaned Petitioner \$5, Petitioner and Mendoza left to buy
9 cocaine, and returned five minutes later. (*Id.*)

10 Finally, Petitioner offers declarations from Clarence Wade and Kathy
11 Lazoff. Neither provides information regarding Petitioner’s mental state at the
12 time of the offenses, however. Wade visited Petitioner shortly before Petitioner
13 moved next door to the Galloways. (Pet. Ex. 168 at 2.) He declared that “[d]uring
14 the two days we spent together I saw Tracy getting high on weed and sherm.” (*Id.*)
15 While Lazoff’s declaration is ambiguous in parts, she does not suggest any
16 information about Petitioner’s condition at the time of the murders. (Pet. Ex. 165.)
17 She declared that she did not go to the party, and she does not indicate that she had
18 any contact with Petitioner that night. (*Id.* ¶ 5.) At most, Lazoff declared that she
19 saw Petitioner “drinking a lot of beer” the day after the murders, that Petitioner
20 was friends with Mendoza, and that Mendoza’s friends “liked to drink and smoke
21 marijuana and crack cocaine.” (*Id.* ¶¶ 3, 6, 8.)

22 (2) Expert Witnesses

23 Petitioner presents a declaration from Stanley J. Huey, Jr., Ph.D. (Pet. Ex.
24 223.) Dr. Huey declares that while “[l]iving in Oxnard with his father[,] . . . Tracy
25 quickly fell into drinking and smoking PCP on nearly a daily basis. On the
26 weekend the Galloways were killed, . . . Tracy spent the weekend at home,
27 drinking and smoking drugs, including freebasing cocaine” (*Id.* at 30.) In
28 support of that statement, Dr. Huey cited only the declarations of Clements and

1 Lazoff and the police interviews of Albis and Pina (*id.*), discussed above.

2 Clements testified only that Petitioner was drinking beer and smoking marijuana,
3 as he testified at trial. Lazoff and Albis provided no information about Petitioner's
4 intoxication at the time of the offenses. Pina stated, as he testified at trial, that
5 Petitioner looked high and seemed "out of it."

6 Petitioner also submits a declaration from psychiatrist Jay Jackman, M.D.
7 (Pet. Ex. 169.) Dr. Jackman declares:

8 Evidence also suggests that Mr. Cain became dependent
9 on alcohol and psychotropic drugs early in his teen years.
10 Friends report that he consumed nearly fatal quantities of
11 PCP, alcohol, and cocaine as an adolescent. . . . Clarence
12 Wade, a contemporary and friend of Tracy's states that
13 Tracy was constantly high on 'sherm,' (PCP). . . .
14 Reports from friends that he habitually drank and used
15 drugs excessively *suggest* that he was either intoxicated
16 at the time of the offense or that he was in withdrawal
17 from intoxicants at the time of the offense. Floyd E.
18 Clements, who was present with Tracy on the night the
19 Galloways were killed, states that . . . everybody 'smoked
20 weed and drank beer that night.'
21 (*Id.* ¶ 55 (emphasis added).)

22 The declaration of Ruth Zitner, Psy.D., (Pet. Ex. 171), echoes the language
23 of Dr. Jackman. She declares:

24 There is also evidence from Tracy's history that he
25 became dependent on psychotropic drugs early in his
26 teen years. Friends report that he consumed nearly fatal
27 quantities of PCP, alcohol, and cocaine as an adolescent
28 Reports from friends that Tracy habitually drank
and used drugs excessively *suggest* that he was either
intoxicated at the time of the offense or that he was in
withdrawal from intoxicants at the time of the offense.

(*Id.* at 62-63 (emphasis added).)

29 Petitioner also presents a declaration from Dr. Donaldson. (Pet. Ex. 172.)
30 Dr. Donaldson declares that he was retained by trial counsel in February 1987 and

1 interviewed Petitioner that month. (*Id.* ¶¶ 4, 7.) He states that “it appears from my
 2 report that the existence of any mental state defenses at the guilt phase of Mr.
 3 Cain’s trial was the scope of the referral question to me. I would have closely
 4 followed the referral question given to me in conducting my interview with Mr.
 5 Cain.” (*Id.* ¶ 6.) Nevertheless, Dr. Donaldson reports no findings regarding any
 6 intoxication at the time of the offenses. (Pet. Ex. 46.) Dr. Donaldson states only
 7 that Petitioner denied using illegal drugs or alcohol in junior high or high school.
 8 (*Id.*) While Dr. Donaldson states later that a detailed social history would have
 9 been “extremely helpful” to him in evaluating Petitioner (Pet. Ex. 172 ¶ 8), there is
 10 no indication that Dr. Donaldson requested any such information from trial
 11 counsel. *See Murtishaw v. Woodford*, 255 F.3d 926, 945 (9th Cir. 2001) (“In the
 12 absence of a specific request, an attorney is not responsible for gathering
 13 background material that might be helpful to a psychiatrist evaluating his client”
 14 (internal quotation omitted)); *Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir.
 15 1997) (“[C]ounsel does not have a duty to acquire sufficient background material
 16 on which an expert can base reliable psychiatric conclusions, independent of any
 17 request for information from an expert” (internal quotation omitted)). Dr.
 18 Donaldson declared that he agreed with the conclusions in Dr. Jackman’s
 19 declaration. (*Id.* ¶ 16.)

20 //

21 **4. Analysis**

22 The California Supreme Court may have reasonably concluded that the
 23 statements provided by the lay and expert witnesses do not reveal any mental state
 24 evidence that competent counsel should have presented at trial. As to the lay
 25 witnesses, defense counsel interviewed Danny Cain before trial. It would have
 26 been a reasonable conclusion that trial counsel performed competently in not
 27 presenting Danny’s speculative statement that Petitioner must have been out of his
 28 mind on dope, when Danny also said Petitioner was mellow when high on

1 marijuana, and he had never seen Petitioner use cocaine, sherms, or PCP. *See*
2 *Chatman*, 38 Cal. 4th at 382 (“No witness may give testimony based on conjecture
3 or speculation”); *Babbitt*, 45 Cal. 3d at 681 (holding trial court “has no discretion
4 to admit irrelevant evidence. Speculative inferences . . . cannot be deemed to be
5 relevant to establish the speculatively inferred fact”). The California Supreme
6 Court may have also reasonably determined that Pina’s opinion that Petitioner
7 seemed high from smoking cocaine or marijuana was inadmissible speculation.
8 Wade, Lazoff, and Albis’s declarations provide no information about Petitioner’s
9 mental state at the time of the offenses, and the account provided in Clements’
10 declaration was presented at trial. Similarly, while Val Cain and Cerda declare that
11 Petitioner was drinking and smoking marijuana on the night of the murders, the
12 California Supreme Court could have reasonably determined that their statements
13 do not speak to whether Petitioner did in fact form the requisite specific intent. *See*
14 *Saille*, 54 Cal. 3d at 1117.

15 The California Supreme Court would have also been reasonable in
16 determining that the opinions proffered by Petitioner’s experts on habeas review
17 are speculative. Dr. Huey indicated that his opinion was based on the statements of
18 Clements, Lazoff, Albis, and Pina, which the court may reasonably have found to
19 be speculative themselves. Likewise, Drs. Jackman, Zitner, and Donaldson opined,
20 at most, that Petitioner’s friends’ reports “suggest” that Petitioner was “either”
21 intoxicated or in withdrawal at the time of the crimes. As shown here, a
22 psychologist’s conclusion that petitioner “*may* not have been able to form the
23 required intent for the crime for which he was convicted” or that it was “quite
24 unlikely that he formed the specific intent necessary for the crime . . . is speculative
25 on its face.” *Griffin v. Johnson*, 350 F.3d 956, 965 (9th Cir. 2003) (holding
26 petitioner had not demonstrated actual innocence and was not entitled to an
27 evidentiary hearing) (internal quotation omitted, emphasis in original); *cf.*
28 *Crittenden v. Ayers*, 624 F.3d 943, 961 (9th Cir. 2010) (finding no prejudice in

light of overwhelming evidence of deliberation and premeditation, where experts opined that killings “most likely” or “might very well have” lacked specific intent); *Franklin v. Johnson*, 290 F.3d 1223, 1234 (9th Cir. 2002) (holding counsel was objectively unreasonable for failing to investigate mental state defense while aware of substance abuse problems, pedophilia, and suicide attempts by defendant accused of sodomizing his stepson, but prejudice had not been established because the “post-conviction record contains no testimony whatsoever, expert or otherwise, concerning the impact of any mental disease or defect on [his] commission of the crime”).

Accordingly, the California Supreme Court’s decision was not an unreasonable application of Supreme Court precedent. Claim 10(12), Claim 2(13), and Claims 2(14) and 2(17) as to diminished capacity are denied.

XV. Claim 2(14)

In Claim 2(14), Petitioner alleges trial counsel was ineffective because his guilt-phase closing argument: (a) “virtually ignored a principal stated defense, diminished capacity due to drug and alcohol intoxication;” (b) “lacked a coherent theory of defense;” (c) “was rife with both factual and legal errors;” and (d) told the jury that “Mr. Cain was a ‘bad guy’ who should be convicted for ‘what he has done.’” (Pet. at 180 ¶ 470; Mot. at 75.)

//

Petitioner does not make any more specific factual allegations in support of those claims. In his Motion, he adds that “[m]any of the facts supporting this subclaim are summarized above in the discussion of the penalty phase ineffective assistance claim.” (Mot. at 74.) Petitioner indicates that at an evidentiary hearing, he would present the evidence identified in support of Claim 2(13) (alleging counsel failed to present evidence supporting a diminished capacity defense). (Mot. at 72-73, 75.)

A. Diminished Capacity Defense

1 The Court denied this portion of Claim 2(14) above. (*See supra* p. 81.)

2 **B. Coherent Theory of Defense**

3 This portion of Claim 2(14) will be considered in Petitioner's broader claim
4 that trial counsel failed to develop and present a coherent guilt-phase theory of the
5 case, Claim 2(17). (*See supra* pp. 58-66, 72-81; *infra* pp. 83-86.)

6 **C. Factual and Legal Errors**

7 Petitioner does not specify what "factual and legal errors" counsel allegedly
8 made in his closing statement, nor does he specify any evidence he would present
9 at an evidentiary hearing that would support this claim. (*See* Pet. at 180 ¶ 470;
10 Mot. at 74); Habeas Corpus R. 2(c)(1)-(2) (requiring petitioner to specify all
11 grounds for relief and supporting facts); L.R. 83-17.7(g) (2003) ("Any request for
12 evidentiary hearing . . . shall include a specification of the factual issues and the
13 legal reasoning that require a hearing and a summary of the evidence of each claim
14 the movant proposes to offer at the hearing"); *Ortiz*, 149 F.3d at 934 (upholding
15 denial of evidentiary hearing on ineffective assistance of counsel claim where
16 petitioner failed "to allege specific facts which, if true, would entitle him to relief"
17 (internal quotation and citation omitted)). The California Supreme Court may have
18 reasonably determined that Petitioner's conclusory allegation fails to demonstrate
19 that counsel's performance was objectively unreasonable. *See Jones*, 66 F.3d at
20 205; *James*, 24 F.3d at 26. Accordingly, this portion of Claim 2(14) is denied.

21 **D. Concessions**

22 The Court denied this portion of Claim 2(14) above. (*See supra* p. 56.)

23 **XVI. Claims 2(2) and 2(17) as to Voir Dire**

24 In portions of Claims 2(2) and 2(17), Petitioner alleges that "[i]f defense
25 counsel intended to admit Mr. Cain's involvement in some of the crimes but
26 contest his innocence of the murders, his conduct in repeatedly emphasizing and
27 stressing the brutality of the crimes to the jury members during *voir dire* was
28 inconsistent with such a purported strategy." (Pet. at 181 ¶ 474; *see also id.* at 168

¶¶ 437-38; Mot. at 75.) Petitioner alleges that “[w]hile questioning virtually every juror during *voir dire*, defense counsel repeatedly emphasized that the crimes charged against Mr. Cain were ‘terrible,’ ‘horrible,’ ‘shocking,’ and ‘inexcusable.’” (Pet. at 168 ¶ 438.)

A. Factual Background

In one representative exchange with a potential juror regarding the possible death penalty, trial counsel stated:

[I]n California . . . they don’t have a death penalty for anything short of murder. . . . In this particular case, Mr. Cain is accused of breaking into his neighbors’ home. His neighbors were white. They were a married couple. The man was in his late fifties, and the woman was in her early sixties. He’s accused of robbing them. He’s accused of raping the female. He’s accused of beating her to death and he’s accused of beating her husband to death. Those are horrible charges. I don’t think there is a reasonable person that would say they’re anything other than shocking, which brings us to a possible second phase, given these charges, because they are shocking. Some people have expressed to us the idea that they would never vote for the death penalty [and others have said that if they convicted on those charges,] . . . he’s going to the gas chamber, I’m not interested in his background, mental state, anything else. So I want to put it to you. These are terrible charges. You can’t sugarcoat them. Would you have an open mind as to either punishment, assuming he’s guilty? . . .

Talking about this mitigation, if we get to that second phase – and it’s awfully awkward for me as his defense lawyer to assume we get there. Assume we get to a second phase. . . . I wouldn’t – I would never attempt to excuse this kind of crime because you can’t excuse a crime. There’s no evidence in the world that I would offer as an excuse. What I would be doing would be offering evidence and reasons why he should be punished in a fashion other than death. Do you see the distinction .

1 ..?”
2 (17 RT 4541-43.)

3 In another representative exchange during *voir dire*, counsel stated:

4 Some of you we’ve talked about . . . the possible brutality
5 that you may witness in photographs. . . . Is there
6 anything about the nature of the charges, the murder,
7 alleged rape, the allegations that these people were
8 beaten to death, that people could not – any of you could
9 not evaluate the evidence? . . . And they’re bad. The
10 photographs of people who are dead are bad. These
11 pictures are in color, and they’re bloody. They’re not
12 going to be introduced to make you angry at one side or
13 the other. They’re going to be introduced for specific
14 evidentiary value. For example, where the injuries
15 occurred, manner of death, cause of death, perhaps time
16 of death. You have to decide those issues and you don’t
17 do it unless you have evidence and evidence is
18 photographs and testimony. A number of people – I’m
19 one of them – don’t like to do it. They’re not pleasant.
20 . . . As a result they couldn’t handle any type of this
21 evidence. That’s fine. But we have to know it now.”

22 (18 RT 4963-65.)

23 **B. Legal Standard**

24 “A fair trial in a fair tribunal is a basic requirement of due process. . . . [A
25 juror’s] verdict must be based upon the evidence developed at the trial. This is
26 true, regardless of the heinousness of the crime charged . . .” *Morgan v. Illinois*,
27 504 U.S. 719, 727 (1992) (holding capital defendant has a right to inquire whether
28 a prospective juror would, upon conviction, automatically vote for death penalty)
(internal quotations omitted). A juror who would automatically vote for a capital
sentence after convicting a defendant on certain allegations would fail to consider
evidence of aggravating and mitigating circumstances in good faith, as the court’s
instructions would require him or her to do. *Id.* at 729.

 Accordingly, “a judge does not plainly err by making a statement in the

1 course of voir dire to determine whether a prospective juror can be fair and
2 impartial in relation to a charge made in the indictment.” *United States v. Mitchell*,
3 502 F.3d 931, 958 (9th Cir. 2007) (finding no error in asking prospective jurors in
4 capital trial whether graphic photographs or testimony would affect their ability to
5 be fair and impartial). In *Mitchell*, the Ninth Circuit noted with approval that
6 “[i]ndeed, [defendant’s] counsel himself prefaced juror voir dire by relating his
7 ‘impression that there are certain crimes which, like many people, you would find
8 very troubling and very disturbing to hear about. . . . And among them might be a
9 crime involving the murder of two people, a nine-year-old and a 65-year-old.’” *Id.*
10 at 958.

11 As at issue in the instant case, in *Fox v. Ward*, the Tenth Circuit held trial
12 counsel was not ineffective for asking questions on *voir dire* that may have
13 portrayed defendant in a negative light. 200 F.3d at 1295. Counsel’s questions,
14 inquiring whether jurors could be open minded about life imprisonment if the
15 defendant were convicted, led one member of the venire to “form[] an opinion as to
16 [defendant’s] guilt based on the voir dire. . . . Moreover, the trial court expressed
17 the opinion that [defendant’s] counsel had gone too far in this line of questioning,
18 to the detriment of his client.” *Id.* at 1294-95. Nonetheless, the
19 Tenth Circuit held that counsel, “recognizing that [state] law requires the same jury
20 to sit for both guilt and penalty phases . . . chose to focus on whether the jurors
21 could be fair during the sentencing phase. This was neither unreasonable nor
22 prejudicial, especially in view of the evidence that counsel . . . [knew] would later
23 be admitted.” *Id.* at 1286, 1295.

24 **C. Analysis**

25 The California Supreme Court may have reasonably concluded that
26 counsel’s questions at *voir dire* were strategic. The court reasonably could have
27 determined that Petitioner failed to overcome the “strong presumption that
28 counsel’s conduct falls within the wide range of reasonable professional assistance

1 . . . [and] might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689
 2 (internal quotation omitted). Counsel’s questions served to identify prospective
 3 jurors who would automatically vote for the death penalty upon convicting a
 4 defendant of the charges Petitioner faced, regardless of any mitigating
 5 circumstances. (*See, e.g.*, 17 RT 4541-43); *see also Morgan*, 504 U.S. at 727;
 6 *Mitchell*, 502 F.3d at 958; *Fox*, 200 F.3d at 1295. The questions also aided in
 7 identifying prospective jurors who could not reach a verdict by “evaluat[ing] the
 8 evidence,” including graphic photographs. (18 RT 4963-65); *see also Morgan*,
 9 504 U.S. at 727; *Mitchell*, 502 F.3d at 958. To the extent that counsel noted the
 10 severity of the charges and the explicitness of the photographs to encourage the
 11 prospective jurors to answer thoughtfully, the California Supreme Court could
 12 have reasonably determined that counsel provided reasonable professional
 13 assistance. Accordingly, Claims 2(12) and 2(17) as to *voir dire* are denied.

14 **XVII. Claim 3(1)**

15 In Claim 3(1), Petitioner contends that “the system established between
 16 CDA and the County of Ventura for the representation of . . . indigent defendants
 17 ensured that Mr. Cain would receive representation from overworked and conflict-
 18 burdened counsel. As a result, the counsel appointed to represent Mr. Cain
 19 pursuant to these contracts labored under an actual conflict of interest.” (Pet. at
 20 183-84 (citation omitted).)¹³

21 The Court has previously held that “[t]his is a conclusory claim for which
 22 Petitioner provides no support, legal or otherwise.” (Order re Pet’r’s Outstanding
 23 Discovery Requests, Sept. 24, 2002, at 24.) The Court ruled that “these allegations
 24

25 ¹³ Petitioner states in his Motion that the “factual disputes at issue in this claim are set forth above
 26 and a corresponding hearing is requested concerning those subclaims. Therefore, Petitioner does
 27 not request an additional hearing on the issue of due process or equal protection [alleged in Claim
 28 3(1)], but instead requests that this Court reserve any ruling” until after the hearing. (Mot. at 67.)
 Petitioner nevertheless includes Claim 3(1) in his motion for an evidentiary hearing on counsel’s
 alleged conflict of interest. (*Id.* at 52; Notice of Mot. and Mot. for Evid. Hr’g at 1.)

1 cannot be the basis for good cause such that discovery is warranted.” (*Id.*)
2 Petitioner provides no further support for Claim 3(1) in his Motion. Accordingly,
3 Petitioner has not “allege[d] facts that, if true, would entitle him to habeas relief.”
4 *West v. Ryan*, 608 F.3d 477, 485 (9th Cir. 2010). The California Supreme Court’s
5 rejection of this claim was reasonable, and Claim 3(1) is denied.

6 **XVIII. Claim 8(4)**

7 In Claim 8(4), Petitioner alleges that unless and until California properly
8 formulates and implements standards for an appropriate lethal injection protocol,
9 “imposition of the lethal injection method would deprive [Petitioner] of his right to
10 due process of law [and] threaten him with the infliction of cruel and unusual
11 punishment.” (Mot. at 94-95; Pet. at 210 ¶ 555.) At the time of his Motion,
12 Petitioner noted that “California has not yet enacted a protocol for executing the
13 condemned and there is no protocol in place This claim is not ripe, and
14 Petitioner raises it at this time to preserve his rights to federal habeas review if it
15 ripens.” (Mot. at 95.)

16 Following the district court’s ruling in *Morales v. Tilton*, 465 F. Supp. 2d
17 972 (N.D. Cal. 2006), “there was a de facto moratorium on all executions in
18 California.” *Morales v. Cate*, 623 F.3d 828, 830 (9th Cir. 2010). California
19 enacted a lethal injection protocol effective August 29, 2010, and scheduled the
20 execution of Albert Greenwood Brown. Brown challenged the new protocol and
21 moved to intervene in the *Morales* action. Holding that “Brown’s federal claims
22 are virtually identical to those asserted” by *Morales*, the court granted the motion
23 to intervene. *Morales v. Cate*, 2010 WL 3751757, at *1 (N.D. Cal. Sept. 24,
24 2010).

25 Considering Brown’s challenge to the new protocol and motion to stay
26 execution, the Northern District of California expressed that it “always has
27 understood, apparently incorrectly, that executions could not resume until it had an
28 opportunity to review the new lethal injection protocol in the context of the

1 evidentiary record developed during the 2006 proceedings.” *Id.* The court
 2 conditionally denied a stay of execution on the basis that “there is no way that the
 3 Court can engage in a thorough analysis of the relevant factual and legal issues in
 4 the days remaining before [petitioner’s] execution date.” *Id.* at *5.

5 The Ninth Circuit remanded, directing the district court, “in light of . . . the
 6 court’s findings regarding the risk of unconstitutional pain inhering in the prior
 7 three-drug protocol, . . . to determine whether, under *Baze*, [petitioner] is entitled to
 8 a stay of his execution as it would be conducted under the three-drug protocol now
 9 in effect.” *Morales v. Cate*, 623 F.3d at 831. The district court lifted a stay of
 10 discovery in the matter on December 10, 2010. *Morales v. Cate*, 2010 WL
 11 5138572, at *9 (N.D. Cal. Dec. 10, 2010).

12 In light of the ongoing *Morales* litigation and Petitioner’s indication that he
 13 raises the claim “to preserve his rights to federal habeas review” (Mot. at 95),
 14 Claim 8(4) shall not be included within the scope of the evidentiary hearing at this
 15 time. Petitioner’s motion for hearing on the claim is denied without prejudice.
 16 Petitioner may renew his request for evidentiary hearing on Claim 8(4) if and when
 17 he deems appropriate.

18 **XIX. Claims 10(2) and 10(3)**

19 In Claim 10(2), Petitioner contends trial counsel was ineffective for failing
 20 to object to the use in aggravation of an allegedly unconstitutional prior conviction
 21 in Arizona. (Pet. at 230-31 ¶¶ 609-14.) In Claims 10(2) and 10(3), Petitioner
 22 alleges counsel was ineffective for advising him to stipulate to the facts underlying
 23 the conviction without informing him that the conviction could be used in
 24 aggravation in support of a death penalty. (*Id.* at 230-32, ¶¶ 609-14, 617.)

25 **A. Factual Background**

26 Petitioner contends his prior conviction was unconstitutional based upon
 27 “the conflict of attorney Paul Hunter, and his abandonment of Mr. Cain . . .” (*Id.*
 28 at 230 ¶ 611.) Petitioner challenged the constitutionality of the conviction in

1 postconviction proceedings in Arizona on the same basis. (State Habeas Pet. Ex.
 2 49, lodged Jan. 12, 1998, at 000868-70.) He alleged “that his case was not
 3 properly presented and that his Attorney represented both himself and a brother-in-
 4 law, who was in fact guilty of the crime of Auto Theft.” (*Id.* at 000879.) The court
 5 appointed attorney George Rouff to represent Petitioner in his postconviction
 6 proceedings. (*Id.* at 000875.) Rouff filed an Attorney’s Supplement to Petitioner’s
 7 Petition for Post Conviction Relief stating that he had reviewed “all available
 8 materials in the file of this case with the Clerk of Court together with an entire
 9 reading of the Transcript on Appeal, all appellate briefs and the entire file of
 10 Attorney Paul Hunter.” (*Id.* at 000869.) Rouff found it “noteworthy that in the
 11 severed trials of the defendants Robert Ross and Tracy Darrel Cain that attorney
 12 Paul Hunter successfully defended defendant Robert Ross and obtained an
 13 acquittal. This attorney sees no conflict of interest in the severed trial of defendant
 14 Tracy Darrel Cain” (*Id.* at 000870.) The Arizona court denied the petition
 15 without elaboration. (*Id.* at 000864.)

16 **B. Analysis**

17 **1. Challenge to Use of Arizona Conviction**

18 First, the California Supreme Court may have reasonably determined that
 19 counsel was not ineffective for failing to object to the use of the Arizona
 20 conviction in aggravation. Contrary to Petitioner’s allegations, trial counsel did
 21 object to its presentation on the ground that it was unconstitutional. Counsel based
 22 his objection on the court’s review of the “voluminous” documents concerning the
 23 conviction and did not argue it further. (22 RT 5899, 5911; 2 CT 272.) The trial
 24 court held:

25 [W]ith respect to . . . the reservation of the defendant’s
 26 right to attack the [] constitutionality or legality of the
 27 Arizona conviction, I paid particular attention to those
 28 court documents from the Arizona Superior Court of the
 County of Yuma. I’m satisfied that the defendant was
 duly arraigned. There were hearings for suppression of

1 evidence on a number of – at least one issue, including
2 *Miranda*. I’m satisfied that the defendant’s constitutional
3 rights were scrupulously protected throughout these
4 proceedings, that he had a fair trial. I see absolutely no
5 constitutional or legal infirmity with the jury’s verdict or
6 with the conviction or with the sentence that was
imposed.
(22 RT 5912.)

7 The state high court may have reasonably concluded that counsel was not
8 ineffective for failing to present additional evidence or argument to the trial court.
9 When a California defendant:

10 challenges the validity of a prior conviction [used in
11 aggravation], he or she bears the burden of establishing
12 its constitutional invalidity. To meet this burden, it is not
13 enough for a defendant simply to make some showing
14 that a constitutional error occurred in the prior
15 proceedings. A prior conviction carries a *strong*
16 *presumption of constitutional regularity*, and the
defendant must establish a violation of his or her rights
that so departed from constitutional requirements as to
justify striking the prior conviction.
17 *California v. Horton*, 11 Cal. 4th 1068, 1136 (1996) (emphasis in original, internal
18 quotation omitted). The claim of error must be based upon one of certain
19 “*fundamental* constitutional flaws,” such as a denial of the right to appeal or a
20 complete denial of representation at a critical stage of trial. *Id.* at 1135. Where a
21 postconviction court of a “sister state[]” has reviewed and denied the claim of
22 error, a California capital defendant may challenge the constitutionality of the prior
23 conviction where an error “appears on the face of the judgment itself” *Id.* at
24 1138.

25 Here, the California Supreme Court may have reasonably determined that
26 the alleged ineffective assistance of Petitioner’s Arizona counsel was not a
27 complete denial of representation. Petitioner has not alleged any other
28 fundamental constitutional flaw. It is reasonable that Petitioner’s unsupported

1 allegation that “his case was not properly presented and that his Attorney
 2 represented both himself and” a guilty co-defendant (State Habeas Pet. Ex. 49 at
 3 000879), would not meet Petitioner’s burden in the California court of establishing
 4 “a violation of his [] rights that so departed from constitutional requirements as to
 5 justify striking the prior conviction.” *California v. Horton*, 11 Cal. 4th at 1136.
 6 Moreover, to the extent that the Arizona postconviction court reviewed and denied
 7 Petitioner’s claim, the California Supreme Court could reasonably have concluded
 8 that no error appears on the face of its judgment. The court, therefore, could
 9 reasonably hold that Petitioner has not demonstrated that counsel would have been
 10 reasonably likely to succeed on a competently argued objection to the use of the
 11 Arizona conviction in aggravation. *See Juan H.*, 408 F.3d at 1273; *see also*
 12 *Fretwell*, 506 U.S. at 370 (holding that where a defendant “claims a right the law
 13 simply does not recognize . . . [he has been] deprived of neither a fair trial nor any
 14 of the specific constitutional rights designed to guarantee a fair trial, [and] he has
 15 suffered no prejudice”) (discussing and quoting *Nix v. Whiteside*, 475 U.S. 157,
 16 186-87 (1986) (Blackman, J., concurring)).

17 **2. Stipulating to Arizona Conviction**

18 Second, the California Supreme Court may have reasonably concluded that
 19 counsel was not ineffective for advising his client to stipulate to the judgement or
 20 for so stipulating. It would not be unreasonable to hold that stipulating to the
 21 conviction was strategically sound to avoid the presentation of testimony from
 22 prosecution witnesses, who may have included the victim or co-defendants. *See*
 23 *Dyer v. Calderon*, 122 F.3d 720, 737 (9th Cir. 1997) (holding that if counsel had
 24 not stipulated to prior conviction, the prosecution “could have called the victim
 25 . . to the stand to testify. Wanting to avoid this potentially damaging testimony,
 26 [counsel’s] stipulation was reasonable”), *vacated on reh’g en banc on other*
 27 *grounds*, 151 F.3d 970 (1998); *Hooker*, 293 F.3d at 1246-47. In *Hooker*, for
 28 example, petitioner argued that trial counsel was ineffective for stipulating to two

1 prior violent felony convictions. 293 F.3d at 1246-47. The Tenth Circuit rejected
2 petitioner's claim. *Id.* The circuit court agreed with the state supreme court that:

3 'the decision to enter the stipulations was part of a
4 calculated strategy to alleviate the potential harm that
5 might occur if the State were allowed to put on its proof
6 regarding the two prior violent felony convictions.' . . .
7 Moreover, we conclude the jury would have found these
8 two aggravating circumstances regardless of the
9 stipulation. Accordingly, counsel retained credibility
10 with the jury by stipulating to the aggravators.

11 *Id.* at 1246, 1246 n.15 (internal citations omitted). Here, too, the California
12 Supreme Court may have reasonably concluded that Petitioner has failed to
13 establish that the jury would not have found the Arizona conviction as an
14 aggravating circumstance absent the stipulation. It was, therefore, not an
15 unreasonable application of Supreme Court precedent to hold that, to the extent
16 that counsel advised Petitioner to stipulate to the Arizona conviction without
17 informing him that the conviction could be used in aggravation in support of a
18 death penalty, counsel did not err, and Petitioner was not prejudiced. Accordingly,
19 Claims 10(2) and 10(3) are denied.

20 //

21 //

22 **XX. Claim 10(4)**

23 Petitioner seeks an evidentiary hearing on Claim 10(4), regarding counsel's
24 alleged failure to object to an uncharged assault allegation by Anita Parker as a
25 factor in aggravation, to interview Ms. Parker about the assault allegation, and to
26 request proper penalty-phase jury instructions about the allegation. (Mot. at 19-
27 20.) Petitioner withdrew this subclaim on August 1, 2001, after the Court found
28 the subclaim to be unexhausted. (Order re Respt.'s Mot. to Dismiss 2d Am. Pet.,
July 23, 2001, at 14-15.) Since the subclaim is unexhausted and has been
withdrawn, no hearing will be held on Claim 10(4).

1 **XXI. Claim 10(8)**

2 In Claim 10(8), Petitioner alleges trial counsel was ineffective for failing to
3 “educat[e] and assist[] Cain in presenting the best possible appearance to the jury,”
4 and for “allowing” Petitioner to be presented to the jury in prison attire during the
5 penalty phase of trial. (Pet. at 235 ¶ 630; Mot. at 23-24.)

6 Petitioner’s appearance in jail attire at the penalty phase was not his first.
7 Just before the jurors delivered their guilt-phase verdicts, and before the jurors
8 were present in the courtroom, the trial court observed that Petitioner appeared that
9 day dressed in his jail uniform. (23 RT 6294.) The court noted that it had
10 “discussed this on one prior occasion” with Petitioner. (*Id.*) The court stated to
11 Petitioner that he may:

12 wear whatever clothing you feel is suitable, and I want to
13 make sure that it is your choice to appear in jail blues
14 today. Is that how you want to be dressed –

15 The Defendant: Yeah.

16 The Court: – for today’s hearing?

17 The Defendant: Yes.

18 The Court: You understand you may wear civilian
19 clothes, as you have done throughout the trial, if you
20 want to?

21 The Defendant: Yeah.

22 The Court: And that it [sic] your choice to appear
23 clothed in the jail uniform today?

24 The Defendant: Yes.

25 The Court: Mr. Steinfeld [Petitioner’s counsel during
26 Wiksell’s absence], have you had an opportunity to talk
27 with Mr. Cain about this?

28 Mr. Steinfeld: Yes, your Honor.

The Court: You’re satisfied this is his decision and that
any efforts that you or I might make is not going to

1 change his mind?

2 Mr. Steinfeld: That's my opinion.

3 (23 RT 6294-95.)

4 The "prior occasion" on which the court discussed Petitioner's clothing with
5 him was before jury selection began. (*See* 2 RT 56-60.) Trial counsel, Wiksell,
6 raised the issue:

7 Mr. Wiksell: Now, I have discussed with Mr. Cain at
8 length his clothing attire during times when the jury is
9 present. I have advised him that in my view
10 preceptions [sic] by the jury are important. They will
11 undoubtedly know that he is in custody, but being
12 dressed in civilian clothes does, in my view, make some
13 what [sic] of a difference. It could make a difference in
14 this case. I also told him that I would secure his own
15 clothing for him. If that was unavailable, I would
16 purchase clothes for him that fit in any manner that he
17 would so choose as long as it wasn't offensive. But, Mr.
18 Cain has told me, and we have had more than one
19 discussion about this, that he wishes to be in court
20 dressed as he is now in front of the Jury throughout the
21 trial; am I correct in that? . . .

22 Defendant Cain: Yes.

23 (*Id.* at 56-57.)

24 The trial court then advised Petitioner at length about his right to appear in
25 civilian clothes. The court added:

26 [I]t seems to me you might be better off if you were
27 dressed as I have advised rather than jail clothes It
28 seems to me you might want to make a good impression
on some of those folks [the jurors]. It is up to you, and
clothes do make an impression, good or bad depending
on what you wear

(*Id.* at 59-60.)

1 The record thus indicates that Petitioner was educated about wearing civilian
 2 clothes and was advised to wear them before the penalty phase of trial, and he
 3 chose to do otherwise. *Cf. California v. Bradford*, 15 Cal. 4th 1229, 1363 (1997)
 4 (holding defendant's stated preference to appear in jail clothing, after he was
 5 advised of his right to do otherwise, defeated his claim that he was compelled to do
 6 so by the trial court). The California Supreme Court may have reasonably
 7 determined that Petitioner presents no evidence to support his conclusory
 8 allegation that counsel did not advise him to wear civilian clothing at the penalty
 9 phase of trial, or that he was unaware that wearing civilian clothing could be
 10 beneficial to him.

11 The court may have reasonably concluded, in addition, that Petitioner's state
 12 and federal constitutional rights were not implicated by his appearance in jail
 13 clothing during the penalty phase of trial. "[R]equiring a defendant to wear prison
 14 clothes during sentencing is not prejudicial and does not violate due process."
 15 *Duckett v. Godinez*, 67 F.3d 734, 746 (9th Cir. 1995); *Bradford*, 15 Cal. 4th at
 16 1363 ("[T]he rule that a defendant may not be compelled to attend trial in jail or
 17 prison garb is premised upon the notion that doing so might subvert the
 18 presumption that an accused is innocent until proved guilty. . . . Because the
 19 presumption of innocence already had been rebutted and defendant had been
 20 found guilty beyond a reasonable doubt, there was no reasonable probability that
 21 the jury would base its penalty decision on the factor of defendant's attire").

22 Petitioner has, therefore, failed to allege facts that, if proved, would entitle
 23 him to relief in Claim 10(8). *See West*, 608 F.3d at 485. The California Supreme
 24 Court's rejection of this claim was not unreasonable. Accordingly, Claim 10(8) is
 25 denied.

26 **XXII. Claim 10(9) (in part) and Claim 10(10)**

27 In Claim 10(9) in part and Claim 10(10), Petitioner alleges trial counsel was
 28 ineffective for failing to investigate and present mitigation evidence regarding

1 Petitioner's mental impairments and life history. (Mot. at 26-44; Pet. at 236-37
2 ¶¶ 632(d), 634.)

3 **A. Factual Allegations**

4 Petitioner contends that trial counsel failed to interview a number of
5 witnesses who could have provided information about Petitioner's life history.
6 (See Mot. at 30 (citing Pet. Exs. 153 ¶ 17, 154 ¶ 14, 157 ¶ 14,¹⁴ 163 ¶ 15, 164 ¶ 20,
7 168 ¶ 10).) Petitioner also alleges that the "mental health expert retained by trial
8 counsel, Dr. Theodore Donaldson, reports that counsel never provided the life
9 history information necessary . . . , but instead provided only 'scant' information
10 based wholly on police reports and an investigation by the district attorney's
11 office." (*Id.* (citing Pet. Ex. 172 ¶¶ 8, 16) (emphasis omitted).) Dr. Donaldson
12 also declared that "it appears from my report that the existence of any mental state
13 defenses at the guilt phase," and not mitigation evidence for any penalty phase, "of
14 Mr. Cain's trial was the scope of the referral question to me." (Pet. Ex. 172 ¶ 6.)

15 Petitioner argues that had trial counsel performed adequately, he would have
16 discovered and presented evidence of Petitioner's separation from his mother at
17 age three or four, his emotional disruption from the separation, and her substance
18 abuse and prostitution. (Mot. at 31-32.) Petitioner alleges that his stepmother
19 physically and emotionally abused him and his siblings, beat them daily and
20 unpredictably, told them they were worthless, made Petitioner and his brother help
21 her shoplift, smoked crack cocaine, and had an affair with a drug dealer. (*Id.* at
22 35.) Petitioner alleges his father emotionally abandoned him, his brothers were
23 poor role models who used drugs and had criminal records, and his sister was a
24 poor role model who became homeless and gave her child up for adoption. (*Id.* at
25 32-33.) Petitioner alleges a family history of substance abuse, including PCP,
26

27 ¹⁴ As noted above, the transcript of a May 1987 interview of Danny Cain by Petitioner's trial
28 counsel and investigator (Pet. Ex. 20) contradicts his statement that he "was never interviewed by
any member of Tracy's defense team." (Pet. Ex. 157 ¶ 14.)

1 marijuana, and alcohol, and alleges that his brother provided drugs to relatives.
2 (*Id.* at 37.) Petitioner also claims that his grandmother and brother suffered from
3 mental illness, for which his grandmother took medication. (*Id.*)

4 Petitioner contends that he had multiple head injuries, including being
5 knocked unconscious from falling into a cement drainage ditch around age ten,
6 hitting his head on the street when he fell off his bike around the same age, being
7 hit in the head repeatedly by his stepmother, being hit in the head with a door, and
8 losing consciousness after falling against a truck bumper. (*Id.* at 38.) Petitioner
9 offers testimony from Dr. Karen Bronk Froming, who interviewed and tested
10 Petitioner and reviewed evidence of his personal history, that Petitioner's
11 intellectual performance is in the borderline retarded range and Petitioner has
12 moderate brain impairment. (*Id.* at 38-39 (citing Pet. Ex. 170).) Petitioner also
13 offers testimony from Dr. Jay Jackman regarding Petitioner's significant
14 psychiatric and neurologic dysfunction (*id.* at 39 (citing Pet. Ex. 169)), and from
15 Dr. Zitner regarding Petitioner's extensive neurological impairments and cognitive
16 deficits (*id.* (citing Pet. Ex. 171)). Petitioner refers to school documents showing
17 his recommendation for special education classes and his learning disabilities. (*Id.*
18 at 38 (citing, *inter alia*, Pet. Ex. 45).) Petitioner also alleges he was likely exposed
19 to alcohol *in utero* (*id.* at 38); used PCP, cocaine, alcohol, and marijuana as an
20 adolescent and young adult and became dependent on alcohol and psychotropic
21 drugs in his early teen years (*id.* at 39-40); and suffered racial harassment from
22 neighbors that had lasting effects (*id.* at 41). Finally, Petitioner alleges that trial
23 counsel failed to investigate and present evidence of his good traits and demeanor,
24 including Petitioner's cooperation and personableness at the Adobe Mountain
25 School, his good performance at his construction job, and his reputation as a
26 gentle, quiet, and reserved person. (*Id.* at 40-41.)

27 **B. Legal Standard**
28

1 The Supreme Court has long held that investigation is one of the hallmarks
2 of adequate representation at the penalty phase of a capital murder trial. *See, e.g.,*
3 *Wiggins*, 539 U.S. at 523 (considering the reasonableness of counsel’s penalty-
4 phase investigation); *Williams (Terry)*, 529 U.S. at 393, 395-96 (holding petitioner
5 had a constitutionally protected right “to provide the jury with the mitigating
6 evidence that his trial counsel either failed to discover or failed to offer” and
7 cataloging mitigating evidence the jury did not hear); *Strickland*, 466 U.S. at 691
8 (holding, in ineffective assistance of counsel challenge to capital sentencing
9 proceeding, that “counsel has a duty to make reasonable investigations or to make
10 a reasonable decision that makes particular investigations unnecessary”); *cf. Penry*
11 *v. Lynaugh*, 492 U.S. 302, 319 (1989) (noting that “it is not enough simply to allow
12 the defendant to present mitigating evidence to the sentencer. The sentencer must
13 also be able to consider and give effect to that evidence”), *abrogated on other*
14 *grounds by Atkins*, 536 U.S. 304.

15 “It is imperative that all relevant mitigating information be unearthed for
16 consideration at the capital sentencing phase. “The Constitution prohibits
17 imposition of the death penalty without adequate consideration of factors which
18 might evoke mercy.”” *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999)
19 (quoting *Hendricks*, 70 F.3d at 1044).

20 //

21 Evidence of childhood abuse, for example, is an important factor in
22 mitigation “because of the belief, long held by this society, that defendants who
23 commit criminal acts that are attributable to a disadvantaged background, or to
24 emotional and mental problems, may be less culpable than defendants who have no
25 such excuse.” *Penry*, 492 U.S. at 319 (internal quotation omitted); *see also, e.g.,*
26 *Williams (Terry)*, 529 U.S. at 370; *Lambright v. Schriro*, 490 F.3d 1103, 1123 (9th
27 Cir. 2007); *Silva v. Woodford*, 279 F.3d 825, 847 n.17 (9th Cir. 2002); *Jackson v.*
28 *Calderon*, 211 F.3d 1148, 1163 (9th Cir. 2000).

1 Evidence of the defendant's mental health history may also be central to his
2 or her mitigation case. *See, e.g., Penry*, 492 U.S. at 319; *Williams (Terry)*, 529
3 U.S. at 370; *Lambright*, 490 F.3d at 1124-25; *Silva*, 279 F.3d at 847 n.17; *Jackson*
4 *v. Calderon*, 211 F.3d at 1163. "Evidence of mental problems may be offered to
5 show mitigating factors in the penalty phase, even though it is insufficient to
6 establish a legal defense to conviction in the guilt phase." *Hendricks v. Calderon*,
7 70 F.3d at 1043. Thus, "an investigation sufficient to foreclose the possibility of a
8 mental defense" does not "necessarily foreclose[] the possibility of presenting
9 evidence of mental impairment as mitigation in the penalty phase," *id.* at 1043-44,
10 or satisfy counsel's duty to investigate such evidence. *See also Wallace v. Stewart*,
11 184 F.3d 1112, 1117 (9th Cir. 1999) (holding competent counsel preparing for
12 penalty phase must investigate potentially mitigating evidence and bring it to the
13 attention of appropriate experts).

14 "Although trial counsel is typically afforded leeway in making tactical
15 decisions regarding trial strategy, counsel cannot be said to have made a tactical
16 decision without first procuring the information necessary to make such a
17 decision." *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006) (holding that
18 because trial counsel's investigation of witnesses' motives for testifying was
19 insufficient, her decision not to cross-examine them on that point could not have
20 been strategic). "Defense counsel must, at a minimum, *conduct a reasonable*
21 *investigation* enabling him to make informed decisions about how best to represent
22 his client." *Alcala v. Woodford*, 334 F.3d 862, 891 (9th Cir. 2003) (internal
23 quotation omitted, emphasis in original). "The Supreme Court has conveyed a
24 clear, and repeated, message about counsel's sacrosanct duty to conduct a full and
25 complete mitigation investigation before making tactical decisions, even in cases
26 involving . . . egregious circumstances." *Earp*, 431 F.3d at 1175 (finding abuse of
27 discretion in trial court's denial of evidentiary hearing on ineffective assistance of
28 counsel claim regarding mitigating evidence). Indeed, "the Supreme Court has

1 made clear that counsel's failure to present mitigating evidence can be prejudicial
 2 even when the defendant's actions are egregious." *Stankewitz v. Woodford*, 365
 3 F.3d 706, 723 (9th Cir. 2004).

4 **C. Analysis**

5 It is unclear to what extent counsel investigated Petitioner's life history and
 6 alleged mental impairments for the penalty phase of trial. Moreover, without
 7 knowing the strength of any missing mitigation evidence, the Court cannot
 8 accurately assess what impact the evidence may have had on the jury's penalty
 9 decision. *See Hendricks v. Vasquez*, 974 F.2d 1099, 1110 (9th Cir. 1992)
 10 ("[W]ithout an evidentiary hearing, we cannot determine whether counsel's
 11 performance had a probable effect on the outcome of the penalty phase"); *see also*
 12 *Bonin*, 59 F.3d at 834 ("[I]n order to determine whether [counsel's actions] . . .
 13 might have affected the jury's decision, it is essential to compare the evidence that
 14 actually was presented to the jury [in mitigation] with the evidence that might have
 15 been presented had counsel acted differently"). Because an evidentiary hearing is
 16 needed in order to resolve these factual questions, the California Supreme Court's
 17 decision summarily rejecting this claim¹⁵ was based on an unreasonable
 18 determination of the facts. *Earp*, 431 F.3d at 1173, 1176 (holding evidentiary
 19 hearing was required to determine "heavily fact-dependent" issue of whether
 20 counsel sufficiently investigated mitigating factors, and state court's decision
 21 without hearing was therefore based on an unreasonable determination of the
 22 facts).

23
 24
 25 ¹⁵ While the California Supreme Court on direct appeal considered Petitioner's argument that trial
 26 CONTINUED

27 CONTINUED

28 counsel was ineffective in his penalty-phase argument for failing to assert Petitioner's lack of
 premeditation as a mitigating factor, *Cain*, 10 Cal. 4th at 79-80, the court did not hold a hearing on
 the instant claim.

1 For these reasons, the Court will hold an evidentiary hearing on Claim
2 10(10) and this portion of Claim 10(9) (Pet. at 236 ¶ 632(d)).

3 **XXIII. Claim 10(6) and Claim 10(9) (in part)**

4 In Claim 10(6) and Claim 10(9) in part, Petitioner alleges trial counsel was
5 ineffective for failing to contest the prosecution's arguments regarding Petitioner's
6 "lack of remorse" as an aggravating factor. (Pet. at 233 ¶¶ 622-26, 236 ¶ 632(c);
7 Mot. at 21-22, 24-26.)

8 **A. Failure to Exclude Petitioner's Statement to Police**

9 Petitioner argues that counsel was ineffective for failing to challenge the
10 introduction of Petitioner's taped statement to police that "provided an evidentiary
11 basis" for the prosecution's arguments. (Pet. at 233 ¶ 623.)

12 **1. Detective Tatum's Testimony**

13 First, Petitioner claims that counsel should have sought to exclude the
14 statement on the basis that Detective Tatum "lied about any malfunction and about
15 Cain's alleged confession during that time." (Mot. at 21.) Petitioner fails to
16 indicate how Detective Tatum's testimony about alleged statements made beyond
17 the scope of the recording forms any basis for the exclusion of statements within
18 the scope of the recording. *Cf. California v. Fauber*, 2 Cal. 4th 792, 828-29 (1992)
19 (finding no error in denial of defendant's motion to suppress witness testimony
20 where prosecutor refused to tape entire witness interview); *California v. Siripongs*,
21 45 Cal. 3d 548, 573-74 (1988) (rejecting defendant's argument that probative value
22 of tape was outweighed by its prejudicial effect because it "contained too many
23 pauses, deletions, and gaps" (internal quotation omitted)). Moreover, as
24 Respondent correctly notes, "Detective Tatum testified that Petitioner . . . admitted
25 stealing \$500 . . . at the point where the tape stopped recording. This particular
26 information was not used by the prosecutor to demonstrate Petitioner's lack of
27 remorse." (Opp. at 25 (citation omitted).) The California Supreme Court may
28

1 have reasonably determined on these grounds that counsel was not ineffective for
 2 failing to challenge the introduction of Petitioner's statement.

3 **2. Petitioner's Mental State**

4 Second, Petitioner contends that counsel should have sought to exclude the
 5 statement because his "mental state impaired this interview. It was apparent to the
 6 detectives interviewing Cain that he had used cocaine extensively prior to the
 7 interview and, as a result, was highly suggestible. Detective Tatum conceded this
 8 when he told Cain during the interview that [h]e thought Cain was on 'dope.'" (Mot. at 21.)

9
 10 The Ninth Circuit has held:

11 While it is true that a waiver of one's *Miranda* rights
 12 must be done intelligently, knowingly, and voluntarily,
 13 the Supreme Court has never said that impairments from
 14 drugs, alcohol, or other similar substances can negatively
 15 impact that waiver. . . . [A]n intoxicated individual can
 16 give a knowing and voluntary waiver, so long as that
 17 waiver is given by his own free will.
 18 *Matylinsky v. Budge*, 577 F.3d 1083, 1095 (9th Cir. 2009) (citations and
 19 parenthetical omitted). The Circuit held in *United States v. Banks* that a suspect
 20 allegedly under the influence of narcotics and alcohol made a knowing and
 21 voluntary waiver where, among other factors, he did "not appear to have been
 22 'incapacitated' by his use of drugs and alcohol," selectively answered questions,
 23 was able to provide a lock combination, and requested that his girlfriend be
 24 contacted to secure his apartment. 282 F.3d 699, 706 (9th Cir. 2002), *rev'd on*
 25 *other grounds*, 540 U.S. 31 (2003). Likewise, the California Supreme Court "has
 26 repeatedly rejected claims of . . . incompetence to waive *Miranda* rights premised
 27 upon voluntary intoxication or ingestion of drugs, where . . . there is nothing in the
 28 record to indicate that the defendant did not understand his rights and the questions
 posed to him." *California v. Clark*, 5 Cal. 4th 950, 988 (1993), *disapproved on*
other grounds, *California v. Doolin*, 45 Cal. 4th 390 (2009); *see also California v.*

1 *Frye*, 18 Cal. 4th 894, 988 (1998), *disapproved on other grounds*, *Doolin*, 45 Cal.
2 4th 390.

3 The California Supreme Court could have reasonably determined that
4 Petitioner makes no factual allegations, and there is nothing in the record to
5 indicate, that he did not understand his rights and the questions posed to him.
6 Petitioner merely alleges that he was “highly suggestible,” not that he did not
7 understand his rights, or the questioning, as a result. (Mot. at 21.) To the contrary,
8 during the police interview, Petitioner provided detailed responses to questions,
9 including the street names of friends’ houses (Pet. Ex. 177 at 3, 9, 15, 17), a
10 friend’s car make and model (*id.* at 11), his probation officer’s name (*id.* at 45), the
11 amount of his most recent paycheck (*id.* at 12), and the times he began and finished
12 work (*id.* at 19). Petitioner fabricated a story to his benefit (*see id.* at 12-20, 24)
13 and asked the police questions about the evidence they had gathered against him
14 (*id.* at 24, 30, 33-34). He asked whether the police were detaining other suspects
15 (*id.* at 46; *cf.* 27-31), and he reasoned about the charges he would face in light of
16 his record and his relative age (*id.* at 42).

17 The California Supreme Court would not have been unreasonable, therefore,
18 in determining that the record indicated that Petitioner understood his rights and
19 the questions asked of him, and that he gave a knowing and voluntary waiver by
20 his own free will. As a result, the court could have reasonably determined that
21 Petitioner has not demonstrated deficient performance or prejudice from trial
22 counsel’s failure to challenge the introduction of his statement on the basis of his
23 alleged intoxication. *See Juan H.*, 408 F.3d at 1273; *Wilson*, 185 F.3d at 990;
24 *Molina*, 934 F.2d at 1447.

25 **B. Failure to Present Evidence regarding Mendoza’s Credibility**

26 Petitioner also argues that counsel was ineffective for failing to present
27 “additional available evidence which challenged the credibility of Mendoza, the
28 only other basis for Mr. Cain’s alleged ‘lack of remorse.’” (Pet. at 233 ¶ 624, Mot.

1 at 21-22 (citing allegations in Claim 1(1)), 25.) First, the California Supreme
 2 Court could have reasonably held that counsel was not ineffective for failing to
 3 present evidence that police did not collect, of stolen items allegedly present at
 4 Mendoza's home. (*See supra* p. 17; *see also supra* pp. 10, 14-15.) Instead,
 5 counsel presented comparable evidence that was reasonably available through
 6 other means. (*Id.*) Second, it would be reasonable to conclude that Petitioner
 7 cannot establish that counsel was ineffective for failing to present evidence that
 8 Mendoza received an inducement for his testimony. Petitioner has failed to present
 9 more than mere speculation that any such inducement existed. (*See supra* pp. 15,
 10 17.) Third, to the extent that counsel was allegedly ineffective for failing to
 11 investigate and present Mendoza's criminal history and testimony from Lazoff and
 12 Clements that Mendoza sought to create an alibi for the night of the murders, those
 13 claims will be included within the scope of the evidentiary hearing. (*See supra* pp.
 14 16, 21.)

15 **C. Failure to Present Evidence regarding Mental Impairments**

16 Finally, Petitioner argues that counsel was ineffective for failing to present:

17 the significant evidence regarding Cain's severe mental
 18 impairments and his abusive and chaotic upbringing. If
 19 counsel had presented this information, it would have
 20 allowed the jury to more accurately evaluate whether
 21 Cain's statements actually indicated a lack of remorse by
 22 an average 'reasonable' person, or whether they were
 23 simply the statements of a mentally and emotionally
 24 impaired individual who could not comprehensibly
 25 express remorse under the limited circumstances
 26 presented by the prosecution.

27 (Mot. at 22, Pet. at 233 ¶ 625.)

28 In support of this claim, Petitioner seeks to present at an evidentiary hearing
 the same testimony upon which he relies in Claim 10(10). (Mot. at 22-23 (citing
 Pet. Exs. 1-69, 71, 83-85, 153-72, 184, 223).) While Drs. Jackman and Bronk
 Froming make no statements in their declarations directly bearing upon Petitioner's

1 alleged lack of remorse, Dr. Zitner reports that Petitioner “was provided with no
 2 moral rudder from which to decipher right from wrong.” (Pet. Ex. 171 at 64 ¶
 3 117.) Because an evidentiary hearing is needed to clarify the nature and weight of
 4 the expert testimony regarding Petitioner’s alleged remorselessness,¹⁶ *see Earp*,
 5 431 F.3d at 1173, the Court will include this subpart of Claims 10(6) and 10(9)
 6 within the scope of the evidentiary hearing.

7 **XXIV. Claim 10(11) and Claim 2(1) (in part)**

8 In Claims 10(11) and 2(1) (in part), Petitioner argues that counsel was
 9 ineffective for failing to “obtain the assistance of an appropriate and competent
 10 conflict-free mental health professional in the preparation and presentation of the
 11 mitigating case on behalf of Mr. Cain.” (Pet. at 237 ¶ 635; *see also* Pet. at 164-67
 12 ¶¶ 431(c)-432; Mot. at 60-65.) Petitioner alleges that Dr. Donaldson was
 13 inadequately informed about Petitioner’s case and failed to properly identify
 14 Petitioner’s mental health problems. (Mot. at 44.) Petitioner claims, among other
 15 issues, that had counsel obtained appropriate mental health expert assistance, he
 16 would have identified and could have presented mitigating evidence of
 17 “longstanding mental health disabilities, including organic non-psychiatric deficits,
 18 psychiatric impairment, and symptoms of the overwhelming trauma he has
 19 experienced, which affect his behavior and functioning.” (*Id.* at 45.)

20 This Court has held that because Petitioner has presented no evidence that
 21 the attorney who retained Dr. Donaldson to examine Cerda was associated with
 22 CDA, as was Petitioner’s trial counsel, it is reasonable to hold the appointment of
 23 Dr. Donaldson was not an adverse effect arising from a conflict of interest. (*See*
 24

25
 26 ¹⁶ While the California Supreme Court on direct appeal considered Petitioner’s argument that the
 27 prosecutor committed misconduct in arguing remorselessness as an aggravating factor, *Cain*, 10
 28 Cal. 4th at 76-78, the court did not hold a hearing on the instant claim, that trial counsel
 erroneously failed to present evidence of Petitioner’s mental impairments to counter the alleged
 evidence of remorselessness.

1 *supra* pp. 43-44; Order re Pet'r's Outstanding Discovery Requests, Sept. 24, 2002,
2 at 17-18.) However:

3 the issue of . . . whether trial counsel's performance with
4 respect to the retention of Dr. Donaldson was
5 constitutionally adequate [remains a separate matter]. Dr.
6 Donaldson declares that it appears the scope of the
7 referral question given to him was solely the existence of
8 any mental state defenses at the guilt phase of the trial.
9 Donaldson Decl. at ¶ 6. Dr. Donaldson also declares: 'I
10 believe that I was not informed at the time, nor was I
11 aware until meeting present counsel, that Mr. Cain had
12 been capitally charged.' Donaldson Decl. at ¶ 7.
13 (Order re Pet'r's Outstanding Discovery Requests, Sept. 24, 2002, at 24.)

14 In support of Claims 10(11) and 2(1) (in part), Petitioner seeks to present at
15 an evidentiary hearing the same testimony upon which he relies in Claim 10(10).
16 (Mot. at 45-46, 64 (citing Pet. Exs. 1-69, 71, 83-85, 153-72, 184, 223).) Because a
17 hearing is needed to clarify the nature and weight of the evidence regarding
18 whether counsel obtained appropriate mental health expert assistance and whether
19 Petitioner was prejudiced by any deficiency, *see Earp*, 431 F.3d at 1173, the Court
20 will include Claim 10(11) and this portion of Claim 2(1) within the scope of the
21 evidentiary hearing.

22 **XXV. Claim 10(9) as to Fontes Incident and Petitioner's Employment Status**

23 In Claim 10(9) (in part), Petitioner alleges counsel was ineffective at the
24 penalty phase of trial for failing to rebut aggravating factors argued by the
25 prosecution by presenting evidence (a) "to show that Mr. Cain did not assault
26 anyone with a deadly weapon during the Fontes incident;" and (b) to demonstrate
27 that Petitioner "was a good, capable and conscientious worker who was always
28 willing to work at an available job" and did not "live[] at home off of his father."
(Pet. at 235-36 ¶ 632(a)-(b).)

29 **A. Fontes Incident**

1 As to the Fontes incident, Petitioner alleges, “After failing to obtain
 2 admission of any such evidence” that Mr. Cain did not assault anyone with a
 3 deadly weapon during the Fontes incident “through the testimony of Richard
 4 Clayton,” counsel did not attempt to admit such evidence through other means. (*Id.*
 5 at 235 ¶ 632(a).) The record, and Petitioner’s own allegations elsewhere,
 6 contradict the factual basis for this claim. Petitioner acknowledges, “A primary
 7 issue in the trial on this incident was whether a ‘deadly weapon’ was utilized in the
 8 assault, either an iron bar or a rock. *Clayton denied the use of any rock by Mr.*
 9 *Cain . . .*” (*Id.* at 115 ¶ 257 (emphasis added).) Indeed, Richard Clayton testified
 10 repeatedly on examination by defense counsel that Petitioner did not use a rock
 11 during the incident:

12 Q. You’re well aware, are you not, of this accusation that
 13 Mr. Cain hit somebody with a rock?

14 A. Yes, I am.

15 Q. Is that true?

16 A. No, that is not true. Not at all.

17 Q. Did you hear anybody say anything about rocks?

18 A. . . . [T]he big, big lady, the mother [of the victim],
 19 had her – her hand on my chest, pushing on me, going,
 20 ‘Get a rock. Get a rock.’ Was her exact words.

21 Q. And she’s yelling?

22 A. The rock was their [the victim’s family’s] idea, yeah.
 23 Exactly. . . .

24 Q. And there was a – you never saw Tracy Cain hit
 25 anybody with a rock; is that correct?

26 A. No. There were no rocks involved. . . .

27 Q. He [Mr. Cain] didn’t hit anybody with a rock?

28 A. No, he didn’t.

(24 RT 6557-58.) Although Clayton testified on cross-examination that he “was
 not standing there watching Tracy Cain” during the fight, he reaffirmed on redirect
 that he did not “see or hear anything to substantiate the accusation that Tracy Cain

1 *used a rock or any other weapon.” (Id. at 6562-64 (emphasis added).)*¹⁷ Thus,
 2 contrary to Petitioner’s claim, trial counsel did elicit testimony from Clayton that
 3 Petitioner did not “assault anyone with a deadly weapon during the Fontes
 4 incident.” (Pet. at 235 ¶ 632(a).) The California Supreme Court’s rejection of this
 5 portion of Petitioner’s claim was therefore reasonable.

6 **B. Employment Evidence**

7 Petitioner next alleges that counsel was ineffective for failing to present
 8 evidence “rebutting [the] allegedly aggravating factor[] urged by the prosecution .
 9 . . that Mr. Cain lived at home off of his father” (*Id.* at 235-36 ¶ 632.) On
 10 direct appeal, the California Supreme Court considered a related claim that in
 11 arguing that Petitioner “lived in his father’s home while working only
 12 sporadically[,] . . . the prosecutor inadvertently strayed from [] permissible
 13 argument into suggesting laziness and selfishness were aggravating factors.” *Cain*,
 14 10 Cal. 4th at 79, 79 n.32. The court concluded that “any error was harmless.
 15 There is no reasonable possibility the jury was moved to sentence defendant to
 16 death because he lacked permanent employment and lived with his father.” *Id.* at
 17 79 n.32.

18 Defense counsel presented some evidence of Petitioner’s employment. At
 19 the penalty phase, Clayton, a general engineering contractor, testified that
 20 Petitioner was working for him in 1985 at the time of the Fontes incident. (24 RT
 21 6552-53.) The jury also learned during the guilt phase that Petitioner was
 22 employed by Manpower Temporary Service in 1986 and sent to various jobs (21
 23 RT 5661-65; *see also* Pet. Ex. 177 at 2-3 (discussed at 21 RT 5850)), but that
 24 employment was not presented or emphasized at the penalty phase.

25
 26
 27 ¹⁷ On defense counsel’s motion, the trial court excluded any evidence suggesting that Petitioner
 28 had used an iron bar. (24 RT 6486-87.) The prosecutor did not argue, and no evidence was
 presented, that Petitioner used an iron bar or any weapon other than a rock in the incident. (*See* 24
 RT 6446, 6485-86.)

1 Although the California Supreme Court considered Petitioner's prosecutorial
2 misconduct claim on direct appeal, the ineffective assistance of counsel claim at
3 hand turns on other evidence. An evidentiary hearing is needed to weigh the
4 employment evidence that trial counsel could have offered in mitigation, and
5 counsel's investigation and strategy surrounding that evidence. *See Bonin*, 59 F.3d
6 at 834 (holding that when a petitioner claims that defense counsel failed to present
7 evidence in mitigation, "in order to determine whether [counsel's actions] . . .
8 might have affected the jury's decision, it is essential to compare the evidence that
9 actually was presented to the jury with the evidence that might have been presented
10 had counsel acted differently"); *Earp*, 431 F.3d at 1173. Accordingly, the Court
11 will include this portion of Claim 10(9) within the scope of the evidentiary hearing.

12 **XXVI. Claim 10(14)**

13 In Claim 10(14), Petitioner alleges trial counsel was ineffective for failing to
14 argue the absence of premeditation as a factor in mitigation. (Pet. at 238 ¶ 638;
15 Mot. at 47-48.) Petitioner alleges that testimony from "mental health experts
16 regarding Petitioner's capacity (or lack thereof) to premeditate and deliberate"
17 would support his claim. (Mot. at 49 (citing Pet. Exs. 169-71).)

18 Petitioner raised this claim on direct appeal. The California Supreme Court
19 reasoned:

20 "Defendant contends his attorney incompetently and prejudicially neglected
21 to argue his lack of premeditation was a mitigating circumstance of the offense.
22 The record belies this claim. The lack of premeditation and deliberation was
23 counsel's primary argument as to the circumstances of the capital crimes. He
24 argued: '[T]here was no preplanning for killing. There was no talking about
25 killing. There was no arming yourselves with a weapon. There was no deliberate
26 killing.' He then described several capital cases with which he was familiar that
27 involved preplanning and deliberation. He concluded: 'To compare this with this
28 was a spontaneous act. There was no preplanning whatsoever. The lack of

1 premeditation. . . . That makes this case not excusable, *but certainly not as bad as*
 2 *some of these others.*’ Counsel then tied the lack of premeditation to the defense
 3 theory defendant was impaired by drug use and was desperate for money with
 4 which to obtain more drugs: ‘*Mitigation*, ladies and gentlemen -- another part of
 5 *mitigation* is intoxication. . . . We know he was intoxicated. . . . He was using
 6 crack. The compunction, ladies and gentlemen, to use cocaine was certainly there.
 7 I submit, ladies and gentlemen, that he could no more control that urge for cocaine
 8 than probably you and I can control being right-handed. . . . That’s a far cry from a
 9 person who is sober, who looks around, who creeps in, who tapes somebody up
 10 and kills them with an axe. It’s a far cry from the kind of person who arms
 11 themselves with a gun and deliberately shoots and kills.’

12 Counsel’s line of argument, while ultimately unsuccessful, was reasonable
 13 and clear. The jurors could not have failed to understand he was arguing lack of
 14 premeditation and deliberation was a mitigating circumstance of the crimes.”
 15 *Cain*, 10 Cal. 4th at 79-80 (emphasis in original).

16 On habeas review, Petitioner alleges that mental health expert testimony
 17 would support his claim that counsel’s performance was deficient. (Mot. at 49
 18 (citing Pet. Exs. 169-171).) Specifically, Petitioner seeks to present evidence from
 19 Dr. Jay Jackman (Pet. Ex. 169), Dr. Karen Bronk Froming (Pet. Ex. 170), and Dr.
 20 Ruth Zitner (Pet. Ex. 171) regarding his lack of capacity to premeditate and
 21 deliberate. Dr. Bronk Froming draws no conclusions, general or specific,
 22 regarding Petitioner’s capacity to premeditate and deliberate. (*See* Pet. Ex. 170.)
 23 Dr. Jackman makes only one statement potentially relevant to the claim, that “Mr.
 24 Cain has significant psychiatric and neurologic dysfunction that affected his
 25 behavior at the time of the offense for which he has been sentenced to death.” (Pet.
 26 Ex. 169 at 26.) Similarly, Dr. Zitner states only that “[i]t is reasonable to believe
 27 that the combination of Tracy’s head traumas, chronic ingestion of alcohol and
 28 drugs and in utero alcohol exposure caused brain damage that has effected [sic] his

1 behavior and mental functioning throughout his entire life, including the time of
2 his crime.” (Pet. Ex. 171 at 64.)

3 While the expert declarations do little to address directly Petitioner’s
4 capacity to premeditate and deliberate, an evidentiary hearing is necessary to
5 determine what evidence Petitioner’s counsel may have been able to present in
6 mitigation, whether he investigated adequately, and whether he made a strategic
7 decision not to present such evidence. *See Bonin*, 59 F.3d at 834 (holding that
8 when a petitioner claims that defense counsel failed to present evidence in
9 mitigation, “in order to determine whether [counsel’s actions] . . . might have
10 affected the jury’s decision, it is essential to compare the evidence that actually
11 was presented to the jury with the evidence that might have been presented had
12 counsel acted differently”); *Earp*, 431 F.3d at 1173, 1175. Accordingly, the Court
13 will include Claim 10(14) within the scope of the hearing.

14 **XXVII. Claim 10(15)**

15 In Claim 10(15), Petitioner alleges trial counsel was ineffective for failing to
16 object to numerous instances of prosecutorial misconduct. (Pet. at 238 ¶ 639; Mot.
17 at 48.) Specifically, Petitioner alleges counsel erroneously failed to object to:

- 18 (a) the presentation of evidence in aggravation regarding a prior felony of
19 which Petitioner was acquitted;
- 20 (b) the admission of an alleged “lack of remorse” as an aggravating factor;
- 21 (c) the presentation of an invalid attempted rape finding as a basis for
22 imposing the death penalty;
- 23 (d) the admission of a non-violent and unconstitutional felony conviction;
- 24 (e) the admission of an uncharged, unadjudicated, and unreliable allegation
25 of assault; and
- 26 (f) false, inaccurate, and inflammatory statements by the prosecution during
27 argument.

28 (*Id.* (referencing Ninth Claim for Relief, Pet. at 217-18).)

1 To establish ineffective assistance of counsel, Petitioner must show that it is
 2 reasonable that the trial court would have sustained the objection or granted the
 3 motion as meritorious. *Wilson*, 185 F.3d at 990 (“To show prejudice under
 4 *Strickland* from failure to file a motion,” petitioner must show, in part, that “had
 5 his counsel filed the motion, it is reasonable that the trial court would have granted
 6 it as meritorious”); *Juan H.*, 408 F.3d at 1273 (“[T]rial counsel cannot have been
 7 ineffective for failing to raise a meritless objection”); *Molina*, 934 F.2d at 1447
 8 (holding that because evidence was admissible, “the decision not to file a motion to
 9 suppress it was not prejudicial. . . . [I]t is not professionally unreasonable to decide
 10 not to file a motion so clearly lacking in merit”).

11 **A. Presentation of Evidence in Aggravation regarding Prior Felony**

12 Petitioner alleges counsel failed to object to prosecutorial misconduct in the
 13 presentation of evidence that Petitioner used a rock as a weapon during the Fontes
 14 incident. (Pet. at 218 ¶¶ 575-77, 238 ¶ 639.) Petitioner argues that the evidence
 15 impermissibly suggested that Petitioner had used a deadly weapon in the incident,
 16 a felony offense of which he was acquitted, or, alternatively, improperly presented
 17 evidence of a misdemeanor conviction. (*Id.* at 575 (citing Cal. Penal Code §
 18 190.3(c)).)

19 Contrary to Petitioner’s allegation, trial counsel brought a motion to exclude
 20 evidence regarding the rock and the Fontes incident before any such evidence was
 21 presented. (*See* 1 CT 87 (“The motion of counsel for the defendant to exclude the
 22 testimony of Mrs. Fontes and said incident is taken under submission by the
 23 court”); 2 RT 188, 213.) Counsel explained that Petitioner was acquitted on
 24 charges of assault with a deadly weapon and using force or violence resulting in
 25 serious bodily injury, and was convicted only of a lesser included offense of
 26 misdemeanor battery. (24 RT 6471.) Counsel argued that because the jury found
 27 Petitioner not guilty on the felony charges, the jury must have found that Petitioner
 28 did not use the rock. (24 RT 6470-87.) He explained that:

1 the defense position, as an offer of proof, is that . . . [a]
 2 fight broke out between these other two people. Later on
 3 Mr. Cain went over to help and he hit somebody but he
 4 didn't hit anybody with a rock. That was the theory
 5 advanced at the trial [H]e certainly wasn't
 6 convicted of using a weapon, a bar or a rock or anything
 7 else. So now at a penalty phase, when it says you can't
 8 present evidence of an offense for which the defendant
 9 was prosecuted and acquitted, how can [] they have
 10 another bite of the apple when she [Fontes] can come in
 11 here and testify that he hit somebody with a rock?

12 (*Id.* at 6482.)

13 The trial court denied counsel's motion. (*Id.* at 6486.) The court reasoned
 14 that the only evidence "presented at that trial, upon which a jury could make any
 15 finding, was that Mr. Cain hit him with a rock. Then they had to have found the
 16 guilty verdict on those facts." (*Id.* at 6483.) The court ruled that Fontes's
 17 testimony would "be limited solely to those facts from which the reasonable
 18 inference of a misdemeanor battery could be drawn since he was acquitted of the
 19 other. But I think that does include the striking with a rock" (*Id.* at 6486.)
 20 Counsel preserved his objection to the admission of Fontes's testimony when she
 21 was found unavailable and her testimony was read to the jury. (*Id.* at 6520-21.)

22 Counsel, therefore, did not fail to object to the introduction of evidence that
 23 Petitioner used a rock during the Fontes incident, as Petitioner alleges. (Pet. at 218
 24 ¶¶ 575-77, 238 ¶ 639.) The California Supreme Court's rejection of Petitioner's
 25 claim of ineffective assistance of counsel on that basis was not unreasonable. This
 26 portion of Claim 10(15) is denied.

27 **B. Argument regarding Lack of Remorse**

28 Next, Petitioner alleges that trial counsel failed to object to the prosecutor's
 misconduct in arguing lack of remorse as an aggravating factor. (Pet. at 220 ¶ 581,
 238 ¶ 639.) Contrary to Petitioner's contentions, counsel did move to "exclude
 evidence or argument regarding Defendant's lack of remorse." (2 RT 44; *see also*

1 2 RT 3, 45-55; 18 RT 4873-74, 4879, 4884-89; 19 RT 5097-5144; 24 RT 6403-04;
 2 25 RT 6717-55; 1 CT 47-50 (Notice of Motion to Exclude Evidence or Argument
 3 regarding Defendants [sic] Lack of Remorse and Points and Authorities); 1 CT
 4 219-22 (Supplemental Points and Authorities to Exclude Evidence or Argument
 5 regarding Defendants [sic] Lack o[f] Remorse).) Counsel repeatedly argued that
 6 (1) “lack of remorse is a nonstatutory factor outside the permissible scope of Penal
 7 Code section 190.3,” (1 CT 48), and (2) allowing such an argument would permit
 8 the jury to “infer[] lack of remorse from the exercise of constitutional rights,” such
 9 as pleading not guilty and declining to testify. (*Id.* at 48-49 (internal quotation
 10 omitted).) Counsel argued that “where there’s no confession and no
 11 acknowledgment of guilt, where the defendant did not take the stand, that it’s [not]
 12 permissible to argue that he feels no remorse.” (25 RT 6722.) He emphasized that
 13 “you can only be remorseful if you’re guilty. The fact that the jury says he’s guilty
 14 doesn’t mean he’s guilty. They say there’s proof beyond a reasonable doubt of his
 15 guilt. And that’s different.” (*Id.* at 6737.)

16 The trial court agreed that “[i]n the absence of an acknowledgment by the
 17 defendant that he has done anything to be sorry for, . . . remorse should not be
 18 permitted to be argued nor should a finder of fact be permitted to infer a lack of
 19 remorse” (*Id.* at 6744.) The court denied counsel’s motion, however, because
 20 it found that Petitioner did:

21 acknowledge[] and admit[] perpetrating crimes upon the
 22 Galloways and assisting others in perpetrating crimes
 23 upon the Galloways as a result of which the Galloways
 24 died. Whether he admits killing them personally or not,
 25 he acknowledges being present when the acts were done .
 26 . . . [A]ny person under like circumstances could be
 27 expected . . . to manifest in his behavior either a feeling
 28 of remorse or a lack of feeling of remorse. . . . If one
 does not express remorse or sympathy or pity or concern,
 then he is not sorry for what he personally has done. And
 such presence or absence of remorse from the facts of

1 this case are matters which the jury can consider in
 2 determining the appropriate punishment. . . . I think that
 3 is a matter that properly can be argued as a factor in
 4 aggravation. . . . The district attorney may argue that
 5 such facts show lack of remorse because there was
 6 reasonable opportunity given to the defendant to display
 7 such emotion, had he chosen to do so.

8 (*Id.* at 6746-51.)

9 Counsel, therefore, did not fail to object to the introduction of evidence or
 10 argument that Petitioner lacked remorse, as Petitioner alleges. (Pet. at 220 ¶ 581,
 11 238 ¶ 639.) The California Supreme Court's rejection of Petitioner's claim of
 12 ineffective assistance of counsel on that basis was not unreasonable. This portion
 13 of Claim 10(15) is denied.

14 **C. Inclusion of Attempted Rape Special Circumstance in 15 Aggravation**

16 Petitioner alleges counsel failed to object to prosecutorial misconduct in the
 17 inclusion of the attempted rape special circumstance finding as an aggravating
 18 factor. (Pet. at 224-25 ¶ 588, 238 ¶ 639.) As noted above (*supra* p. 66 n.10), at the
 19 penalty phase of trial, the jury properly takes into account any special
 20 circumstances found to be true at the guilt phase. Cal. Penal Code § 190.3(a). The
 21 California Supreme Court could reasonably have concluded that because the jury
 22 found true the attempted rape special circumstance allegation (2 CT 411), counsel
 23 could not have been ineffective for failing to object to its consideration at the
 24 penalty phase. *See Juan H.*, 408 F.3d at 1273; *Wilson*, 185 F.3d at 990; *Molina*,
 25 934 F.2d at 1447. This portion of Claim 10(15) is therefore denied.

26 **D. Inclusion of Automobile Theft Conviction in Aggravation**

27 Petitioner alleges counsel failed to object to prosecutorial misconduct in the
 28 introduction of evidence in aggravation of Petitioner's conviction for automobile
 theft at age eighteen. (Pet. at 225 ¶ 589, 238 ¶ 639.) Petitioner claims that the

1 prosecutor's introduction of the conviction was misconduct because (1) a "prior
 2 non-violent felony conviction of an 18-year[-]old does not bear the necessary
 3 relationship to the capital offense that is required in order that the penalty
 4 determination be a reliable one" (*id.* at 225 ¶ 592) and (2) "the prosecutor's use of
 5 this conviction violated the Double Jeopardy clause." (*Id.* at 226 ¶ 594.)

6 The California Supreme Court considered the first of Petitioner's arguments
 7 on direct appeal. *Cain*, 10 Cal. 4th at 75-76. The court held:

8 In his facial challenge, defendant asserts the existence of
 9 prior nonviolent felony convictions does not rationally
 10 assist the jury in deciding which capital defendants are
 11 worthy of the death penalty. We have held that prior
 12 felony convictions not involving force or violence are
 13 relevant to demonstrate that the capital offense was
 14 undeterred by prior successful felony prosecutions. Prior
 15 convictions tend to show the capital offense was the
 16 culmination of habitual criminality – that it was
 17 undeterred by the community's previous criminal
 18 sanctions. Defendant offers no authority for his view that
 19 consideration of such convictions renders the penalty
 20 decision unfair or unreliable. . . .

21 As to the specific use of defendant's auto theft
 22 conviction, defendant argues his conviction for 'teen-age
 23 participation in a car theft' was irrelevant or unreliable as
 24 a factor in the penalty decision. Taken alone, of course, a
 25 prior auto theft, by a teenager or anyone else, would not
 26 be a reason for choosing a death sentence. The
 27 conviction here, however, was not taken alone; it was but
 28 one fact in defendant's background the jury could
 consider in assessing his character and culpability.
 Together with the evidence of later violent conduct . . . as
 well as the capital crimes, it tended to show a pattern of
 criminal behavior undeterred by penal sanctions.

Id. (internal quotations and citations omitted).

The state high court did not unreasonably apply Supreme Court precedent in
 holding that the jury could properly consider a non-violent felony in aggravation.

1 *See Barclay v. Florida*, 463 U.S. 939, 945, 956 (1983) (holding, in capital case,
 2 that “nothing in the United States Constitution prohibited the trial court from
 3 considering [defendant’s] criminal record” including “breaking and entering with
 4 intent to commit the felony of grand larceny, [about which] the trial judge did not
 5 know whether it involved the use or threat of violence”). The jury could also
 6 properly consider the felony in aggravation notwithstanding Petitioner’s age of
 7 eighteen years at the time of the offense. *Cf. Cox v. Ayers*, 613 F.3d 883, 889 (9th
 8 Cir. 2010) (affirming denial of capital habeas relief where the “prosecutor
 9 presented aggravating factors in the form of evidence about two robberies in which
 10 Petitioner had participated as a juvenile”). Finally, as to Petitioner’s second
 11 argument raised here, the consideration of the prior conviction in aggravation did
 12 not violate Petitioner’s double-jeopardy protections. *Cf. Sattazahn v.*
 13 *Pennsylvania*, 537 U.S. 101, 105, 116 (2003) (holding prosecution may seek death
 14 penalty based on aggravating prior felony convictions, against double-jeopardy
 15 challenge raised on other grounds).

16 The California Supreme Court’s denial of this claim, on habeas review and
 17 in part on direct appeal, was therefore not unreasonable. Claim 10(15) as to
 18 ineffective assistance of counsel on this basis is denied.

19 **E. Presentation of Evidence of Alleged Assault on Parker**

20 Petitioner alleges counsel failed to object to prosecutorial misconduct in
 21 “pressuring [] witness Anita Parker to provide factually inaccurate and incomplete
 22 information, and [making] constitutionally impermissible use of the totally
 23 unreliable and uncharged allegation of assault” by arguing it as a factor in
 24 aggravation. (Pet. at 227 ¶ 596; *see also id.* at 113 ¶¶ 247, 249; 238 ¶ 639.)
 25 Specifically, Petitioner alleges:

26 [T]he district attorney’s investigator and [Parker’s] father
 27 (who hated Mr. Cain) colluded to force her testify [sic]
 28 about the alleged assault with the tire iron, and that she
 was pressured into giving this testimony. . . . [T]he

1 prosecutor in Mr. Cain's case, and his agents, pressured
 2 Ms. Parker into presenting [the incident]. . . .
 3 Furthermore, the prosecutor did not have the witness
 4 testify truthfully about her lengthy history of assaults on
 5 boyfriends in general and Mr. Cain in particular, in spite
 6 of his knowledge of these facts, and instead presented a
 7 truncated and factually inaccurate account of this
 8 incident. Then, the prosecutor relied extremely heavily
 9 on this purported 'crime' as factor [sic] in aggravation
 10 justifying imposition of the death penalty.
 11 (Pet. at 113 ¶¶ 247, 249.) Petition makes no other factual allegations in support of
 12 this claim.

13 This Court has ruled that Petitioner's claim that counsel failed to object to
 14 the prosecutor's use of the Parker incident is unexhausted. (Order re Respt.'s Mot.
 15 to Dismiss 2d Am. Pet., July 23, 2001, at 14 ("Petitioner[s] claim[] that trial
 16 counsel was ineffective because he did not object to the use of the assault incident
 17 involving Anita Parker as an aggravating factor . . . was not presented" to the state
 18 court).) That allegation is not appropriate for an evidentiary hearing.

19 As to Petitioner's claim that the investigator and Parker's father "colluded"
 20 to pressure or force Parker to testify, the California Supreme Court could have
 21 reasonably determined that the allegation is not supported by her declaration or by
 22 any other evidence. Parker declares:

23 I remember the day that the District Attorney's
 24 investigator came to interview me about Tracy's case.
 25 My father was present for the entire interview. My father
 26 hated Tracy and he answered all of the questions that the
 27 investigator asked of me. I didn't have [a] chance to
 28 answer the questions.

The investigator wanted to know about the time that
 Tracy and I had a fight and Tracy hit me with a tire iron.
 My father told him the story and I didn't have a chance to
 answer. After my father told the story, I felt I had to
 stick with it because both my father and the investigator

1 would have been really angry if I changed it.
2 (Pet. Ex. 178 ¶¶ 8-9.) There is nothing in Parker's declaration to indicate any
3 collusion between the police and her father. Parker makes no statement that the
4 investigator and her father had any agreement or arrangement whatsoever. Any
5 common interest between the investigator and Parker's father in aiding Petitioner's
6 prosecution does not show prosecutorial misconduct.

7 Similarly, the court could have reasonably determined that Parker's
8 statements provide no support for Petitioner's allegations that the prosecutor
9 pressured her into testifying, falsely or otherwise. Parker says that her father, not
10 the investigator, kept her from answering the investigator's questions. She
11 provides no basis for her statement that the investigator "would have been really
12 angry" if she told a different story from her father's. (Pet. Ex. 178 ¶ 9.) Parker's
13 potentially unreasonable belief, absent any supporting allegations, cannot establish
14 prosecutorial misconduct. The court was also reasonable to reject Petitioner's
15 claim that the prosecutor presented untruthful and inaccurate testimony from
16 Parker. Petitioner's only specific allegation in support is that "the prosecutor did
17 not have [Parker] testify truthfully about her lengthy history of assaults on
18 boyfriends in general and Mr. Cain in particular," leading to an inaccurate
19 portrayal of the incident. (Pet. at 113 ¶ 249.) Trial counsel had successfully
20 moved, however, to exclude evidence regarding all incidents of violence
21 surrounding Parker besides that involving the tire iron (*see* 2 RT 177-78, 181-82;
22 24 RT 6460-66), a motion Petitioner does not challenge as ineffective. Those
23 incidents included one in which Parker stabbed Petitioner in the arm with a steak
24 knife, because he was holding her sister on the ground. (2 RT 150; *see also id.* at
25 177-78.) Nevertheless, on cross-examination trial counsel elicited testimony from
26 Parker that she once cut Petitioner on the arm with a knife. (24 RT 6457.) The
27 prosecutor was barred from presenting that incident, or any others, by the trial
28 court's ruling. Finally, the California Supreme Court could have reasonably

1 determined both that there is no evidence in the record of any assaults by Parker on
2 other boyfriends and that the prosecutor would have had no duty to question Parker
3 about any such assaults.

4 Thus, the state high court would have been reasonable in concluding that
5 Petitioner's allegations of prosecutorial misconduct toward Parker are unsupported,
6 and as a result, that his claim of ineffective assistance of counsel for failing to
7 object does not merit relief. *See Juan H.*, 408 F.3d at 1273. Accordingly, this
8 portion of Claim 10(15) is denied.

9 **F. False, Inaccurate, and Inflammatory Statements in Argument**

10 Petitioner alleges counsel failed to object to the prosecutor's misconduct in
11 making "false, inaccurate and inflammatory statements" in his penalty-phase
12 arguments. (Pet. at 227 ¶ 597, 238 ¶ 639; *see also* Pet. at 120 ¶ 277.) Petitioner
13 claims the prosecutor (1) improperly referred to Petitioner's "'attitude' and failure
14 to express numerous vague emotions as a 'strong aggravating factor;'" (2)
15 provided a "personal interpretation" of the evidence; (3) "testif[ied]" about his own
16 life to derogate Petitioner's mitigation evidence; and (4) made "false and
17 inflammatory statements regarding the evidence presented and Mr. Cain
18 personally." (*Id.* at 227 ¶ 597.)

19 **1. Legal Standard**

20 "In evaluating allegations of prosecutorial misconduct," including claims
21 "that the prosecution made [improper] statements in summation," the Court must
22 "consider whether the prosecution's actions 'so infected the trial with unfairness as
23 to make the resulting conviction a denial of due process.'" *Hein v. Sullivan*, 601
24 F.3d 897, 912 (9th Cir. 2010) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181
25 (1986)). "It is not enough that the prosecutors' remarks were undesirable or even
26 universally condemned." *Darden*, 477 U.S. at 181. Petitioner must demonstrate
27 that the prosecutor's error was not "harmless," but "had substantial and injurious
28 effect or influence in determining the jury's verdict," or leaves "grave doubt" about

1 whether the error affected the jury. *Sechrest v. Ignacio*, 549 F.3d 789, 808 (9th
 2 Cir. 2008) (internal quotation omitted). In determining whether a comment
 3 rendered a trial constitutionally unfair, the court may consider:

4 whether the comment misstated the evidence, whether the
 5 judge admonished the jury to disregard the comment,
 6 whether the comment was invited by defense counsel in
 7 its summation, whether defense counsel had an adequate
 8 opportunity to rebut the comment, the prominence of the
 comment in the context of the entire trial and the weight
 of the evidence.

9 *Hein*, 601 F.3d at 912-13 (citing *Darden*, 477 U.S. at 182).

10 “Because many lawyers refrain from objecting during . . . closing argument,
 11 absent egregious misstatements, the failure to object during closing argument . . . is
 12 within the ‘wide range’ of permissible legal conduct.” *United States v. Necoechea*,
 13 986 F.2d 1273, 1281 (9th Cir. 1993).

14 **2. California Supreme Court Determination**

15 The California Supreme Court considered Petitioner’s claim on direct
 16 appeal. The court held:

17 The prosecutor did not misconduct himself in giving his
 18 interpretations of two statements made by defendant
 19 (‘That’s on them’ and ‘They laugh at shit like that,
 20 man’); although the meaning of these phrases was less
 21 than absolutely clear, the prosecutor’s interpretations
 22 were reasonable. Nor did he go beyond the evidence in
 23 arguing defendant had led a selfish and brutal life, had
 24 used his physical strength to intimidate and frighten
 25 others and had lived in his father’s home while working
 26 only sporadically. Finally, the prosecutor’s passing
 27 reference to the death of his own maternal grandparents
 28 when his mother was only 13 years old bore no
 reasonable possibility of influencing the penalty verdict.
 Since all these asserted instances of unobjected-to
 misconduct were either proper or clearly
 harmless, we . . . reject defendant’s claim counsel’s
 failure to object constituted ineffective assistance.

1 *Cain*, 10 Cal. 4th at 78-79 (citations and footnote omitted).

2 **3. Analysis**

3 **a. Comments on Petitioner's Attitude**

4 First, Petitioner argues counsel was ineffective for failing to object to the
5 prosecutor's discussion of Petitioner's attitude and emotional response to the
6 crimes. (Pet. at 118-19 ¶¶ 268-71, 238 ¶ 639.)

7 The prosecutor referred to Petitioner's "attitude after the crime is
8 committed." (25 RT 6788.) He discussed Petitioner's alleged:

9 (a) statements that "I knocked them smooth out" and "I
10 got thousands," saying Petitioner "brags about such
11 things" (*id.*);

12 (b) reentry into the Galloways' home, saying it "doesn't
13 horrify him. That doesn't make him feel: Oh, what have
14 I done? No. He goes out after that, goes on a shopping
spree." (*Id.* at 6789). "That's pretty cold." (*Id.*);

15 (c) purchase of a newspaper to "read[] about his exploits.
16 Cold-hearted." (*Id.*);

17 (d) statement to the television reporter, "den[ying]
18 knowing anything about it. No respect for the truth. No,
19 you know, go talk to somebody else. No, I'm going to be
20 on TV. I'm a big man. Absolutely extraordinary. No
sense of decency. No shame." (*Id.* at 6789-90);

21 (e) statement, when asked if he killed the Galloways,
22 "'That's on them.' That's their tough luck. . . . They're
23 fake, they're dead, they're gone. That's their problem."
24 (*Id.* at 6790);

25 (f) statement to police, when asked if he felt anything for
26 the Galloways when he reentered the house, that he "'was
27 scared.' Look out for number one. The hell with
28 anybody else. . . . 'They laugh at shit like that, man.'
Who does Tracy blame it on? Everybody else? . . . He

1 can't bring himself to recognize them as human beings
2 He's given every opportunity to express sorrow,
3 sympathy, pity, remorse. Nothing. . . . Just a fear that
4 he'd be caught. Selfish. Remorseless. You know, in a
5 sense it's not the defendant's size that frightens you. . . .
6 It's his attitude toward other human beings."

7 (*Id.* at 6790-91.)

8 Counsel moved to exclude evidence or argument regarding Petitioner's lack
9 of remorse before the prosecutor's argument. (*See supra* p. 114.) The trial court
10 denied counsel's motion, ruling:

11 [A]ny person under like circumstances could be expected
12 . . . to manifest in his behavior either a feeling of remorse
13 or a lack of feeling of remorse. . . . And such presence or
14 absence of remorse from the facts of this case are matters
15 which the jury can consider in determining the
16 appropriate punishment. . . . I think that is a matter that
17 properly can be argued as a factor in aggravation. . . .
18 The district attorney may argue that such facts show lack
19 of remorse because there was reasonable opportunity
20 given to the defendant to display such emotion, had he
21 chosen to do so.

22 (*Id.* at 6746-51.)

23 Counsel objected in advance to the arguments regarding lack of remorse; he
24 was not ineffective for failing to object. The California Supreme Court may have
25 reasonably found that the record demonstrates it is not reasonable that the trial
26 court would have sustained a second objection to the prosecutor's arguments, and
27 thus that Petitioner cannot establish prejudice. *See Wilson*, 185 F.3d at 990 ("To
28 show prejudice under *Strickland* from failure to file a motion," petitioner must
show, in part, that "had his counsel filed the motion, it is reasonable that the trial
court would have granted it as meritorious"). Because the court's denial of
Petitioner's claim was not unreasonable, Claim 10(15) as to arguments on lack of
remorse is denied.

b. Personal Interpretation of the Evidence

(1) Allegations

Next, Petitioner argues trial counsel erroneously failed to object to the prosecutor's personal interpretations of the evidence. (Pet. at 119-20 ¶ 274, 238 ¶ 639.) Specifically, Petitioner alleges that:

the prosecutor first deliberately misstated the testimony regarding the hearsay question that Mr. Cain's brother supposedly asked, and claimed that the question specifically asked Mr. Cain if he killed the Galloways. (RT 6790[.])

The prosecutor then compounded this misconduct by repeatedly stating his own personal interpretations of Mr. Cain's alleged answer This argument . . . consisted of pure speculation. An equally valid interpretation of the phrase is that Mr. Cain was asserting ignorance as to the condition of the individuals in question, or that the 'them' referred to other individuals who had perpetrated the crime.

(Pet. at 119-20 ¶ 274.) Petitioner takes issue with the prosecutor's argument that Petitioner's alleged statement, "That's on them," (20 RT 5498), meant, "That's their [the Galloways'] tough luck. . . . They're fake, they're dead, they're gone. That's their problem." (25 RT 6790.)

//

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(2) Analysis

The prosecutor asked Mendoza on direct examination:

Q. Well, did anybody ask him [Petitioner], 'Did you kill anybody?'

A. Yes.

Q. Who asked him that?

A. Humm – Val.

Q. What did Val ask him?

A. What did he do with the people.

1 Q. And what did the defendant say?

2 A. 'That's on them.' . . .

3 (20 RT 5498.)

4 In his closing argument, the prosecutor told the jury that Val asked
5 Petitioner, "'Did you kill those people?'" (25 RT 6790.) Given that Mendoza
6 affirmed that Val asked Petitioner, "Did you kill anybody," the California Supreme
7 Court may have reasonably determined that the prosecutor did not misstate the
8 evidence.

9 As to the prosecutor's interpretation of "That's on them," the California
10 Supreme Court held that "the prosecutor's interpretations were reasonable." *Cain*,
11 10 Cal. 4th at 78. The court may have reasonably determined that this argument by
12 the prosecutor also stated a "reasonable inference" based on the record. *See United*
13 *States v. Atcheson*, 94 F.3d 1237, 1244 (9th Cir. 1996); *cf. United States v. Young*,
14 470 U.S. 1, 8 n.5 (1985) (quoting American Bar Association's "useful guideline[]" that "[t]he prosecutor may argue all reasonable inferences from evidence in the
15 record"). On facts similar to those at hand, the defendant in *Atcheson* alleged that:

17 the prosecutor argued outside the record when referring
18 to [defendant's] failure to deny his involvement in the
19 crime to his cousin, Jeff Ettleman. Ettleman testified that
20 he read to [defendant] a newspaper article naming him as
21 one of the perpetrators of the crime. Ettleman further
22 testified that [the defendant] interrupted him as he read
23 the first names of the other suspects and that [the
24 defendant] supplied the last names of the suspects. The
25 Government, in referring to this testimony, argued as
26 follows: 'But what's more important about Ettleman's
27 testimony is what [the defendant] didn't say to him. [The
28 defendant] didn't say, "Are you kidding me? They got
me charged with a crime that serious?" And "I didn't do
it.'"

94 F.3d at 1244. The Ninth Circuit held that "it was reasonable for the prosecutor

1 to infer from Ettleman’s testimony that [the defendant] did not deny his
2 involvement in the crime to his cousin.” *Id.* at 1244.

3 The California Supreme Court may have reasonably determined that the
4 prosecutor’s comment here, as in *Atcheson*, was a reasonable inference from the
5 record. Indeed, Petitioner himself implicitly concedes that the prosecutor’s
6 interpretation was “equally valid” to the one posited in his Petition. (Pet. at 119-20
7 ¶ 274.) Counsel cannot be ineffective for failing to raise an objection to an
8 unobjectionable comment. *See Juan H.*, 408 F.3d at 1273. Accordingly, the
9 California Supreme Court was not unreasonable in denying this portion of Claim
10 10(15).

11 **c. Testimony about Prosecutor’s Life Experiences**

12 Third, Petitioner argues trial counsel failed to object to the prosecutor’s
13 “testimony” about his life experience to derogate Petitioner’s mitigation evidence.
14 (Pet. at 120 ¶¶ 275-76, 238 ¶ 639.) Petitioner alleges that “[i]n denigrating the
15 effect of Mr. Cain’s mother committing suicide in the Jonestown tragedy when he
16 was only a teenager, the prosecutor testified regarding his own response to the
17 death of both his maternal *grandparents* when he was only 13. (RT 6805[.]).” (*Id.*
18 ¶ 275 (emphasis in original).) Petitioner claims the prosecutor committed
19 misconduct in attempting “to rebut a mitigating circumstance with his own
20 personal history outside the record.” (*Id.* ¶ 276.)

21 Petitioner misstates the prosecutor’s argument slightly. The prosecutor
22 remarked upon his mother’s parents’ deaths by the time his mother was 13, not by
23 the time he was 13, and he said nothing about his or his mother’s response to their
24 deaths. He argued:

25 So what effect does his natural mother dying in
26 Jonestown have? We all had bumps along the road. We
27 all have – my mother’s parents were both dead by the
28 time she was 13. You know, we could all think of
examples of things that have gone wrong. Is life perfect?

1 The answer is no.

2 (25 RT 6805-06.)

3 The California Supreme Court held that “the prosecutor’s passing reference
4 to the death of his own maternal grandparents when his mother was only 13 years
5 old bore no reasonable possibility of influencing the penalty verdict.” *Cain*, 10
6 Cal. 4th at 79. That conclusion is not unreasonable, taking the statement in
7 isolation. On habeas review, however, this Court must “first analyze the
8 prosecutorial misconduct challenges to assess whether they alone so infected the
9 trial with unfairness as to make the resulting conviction a denial of due process. If
10 the prosecution’s comments alone do not meet this standard, we analyze them
11 together” with any allegations of prosecutorial misconduct in failing to disclose
12 evidence to the defense, “to determine whether there is a reasonable probability
13 that without those violations the result of the proceeding would have been
14 different. In doing so, we concentrate on the touchstone of *Brady*’s materiality
15 standard: that, even with the trial errors, petitioners received ‘a trial resulting in a
16 verdict worthy of confidence.’” *Hein*, 601 F.3d at 915-16 (quoting *Kyles*, 514 U.S.
17 at 434).

18 Before the Court would reach any prejudice analysis here, however,
19 Petitioner would have to demonstrate that the California Supreme Court’s
20 application of the deficient performance prong of the *Strickland* standard was
21 unreasonable. *See Richter*, 131 S. Ct. at 784 (holding petitioner must show “there
22 was no reasonable basis for the state court to deny relief,” regardless of “whether
23 or not the state court reveals which of the elements in a multipart claim it found
24 insufficient”).

25 The *Richter* Court noted:

26 Although courts may not indulge *post hoc* rationalization
27 for counsel’s decisionmaking that contradicts the
28 available evidence of counsel’s actions, neither may they
insist that counsel confirm every aspect of the strategic

basis for his or her actions. There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. . . . *Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.

Id. at 790 (internal quotations and citations omitted). There is no available evidence suggesting that counsel's non-objection to the prosecutor's statement was not a reasonable trial tactic. "Because many lawyers refrain from objecting during . . . closing argument, absent egregious misstatements, the failure to object during closing argument . . . is within the 'wide range' of permissible legal conduct." *Necoechea*, 986 F.2d at 1281. The California Supreme Court, therefore, could have reasonably determined that trial counsel's performance in not objecting to the prosecutor's statement was objectively reasonable.

Accordingly, Petitioner is not entitled to federal habeas relief on this portion of Claim 10(15).

**d. False and Inflammatory Statements regarding
Evidence and Petitioner**

Fourth, Petitioner argues trial counsel failed to object to the prosecutor's false and inflammatory statements regarding the evidence and Petitioner himself. (Pet. at 120-22 ¶¶ 277-82, 238 ¶ 639.) The California Supreme Court held on direct appeal that the prosecutor did not "go beyond the evidence" in any of the arguments Petitioner challenges here. *Cain*, 10 Cal. 4th at 79.

At the outset, Petitioner alleges that the prosecutor "repeatedly referred to Mr. Cain's physical size, and asserted that Mr. Cain had 'built himself up' just so he could 'frighten and intimidate people.'" (Pet. at 120 ¶ 278 (citing 25 RT 6791, 6797, 6807).) Petitioner contends that the statements were unsupported because Petitioner's size was "simply not that remarkable," there was evidence at trial that Petitioner had done physical labor and construction work and no evidence of body-building or exercising, and there was no evidence that Petitioner had ever used his

1 size or alleged strength to frighten or intimidate anyone. (*Id.*)

2 The prosecutor argued:

3 You know, in a sense it's not the defendant's size that
4 frightens you. It's his attitude. It's his attitude toward
5 other human beings. He's a big man, but it's his attitude
6 that's frightening. . . . On the prior history, remember, . .
7 . . [t]he defendant is in a juvenile detention facility in
8 Arizona, and he belts the guard. And it was even brought
9 out, you know, hey didn't your glasses have a lot to do
10 with your injury? Well, is that a mitigating factor, if you
11 slug a guy and he has glasses or doesn't have glasses
12 when you're as big as the defendant is, you're going to
13 produce an injury, now it may be a little bit worse? . . .

14 There's no excuse for what he did. Not at all. You know,
15 the one improvement he's made in life. He didn't improve
16 himself as vis-a-vis schooling. He didn't improve himself
17 by saying, I'm going to be welder [sic], I'm going to be
18 plumber [sic] or I'm going to be an architect. What did he
19 do? He did that he built himself up for, extraordinary
20 strength. What was the reason for it? Did he get into body
21 building championships because he wanted to show
22 people, Hey, stay off drugs, live healthy, be happy? Did
23 he do that? No. He did this. So he could frighten and
24 what he's used this for is to frighten and intimidate

25 people, not to give them a message to lead a healthy life
26 and stay in good shape

27 (25 RT 6791, 6797, 6807.)

28 The California Supreme Court reasonably could have found evidence in the
record established that Petitioner had a substantially muscular physique. Four
photographs of Petitioner, from the waist up and without clothing, were admitted
as evidence at trial. (Pet. Exs. 123-26.) The juvenile detention officer, Perez, also
testified that Petitioner at age sixteen was "[w]ell built." (24 RT 6504.) The
California Supreme Court was not unreasonable in determining that it was a

1 reasonable inference from that evidence that Petitioner had “built himself up,” was
2 “a big man,” or had “extraordinary strength.” There was also evidence that
3 Petitioner used his physical size or strength to frighten and intimidate people.
4 Mendoza testified, for example, that Petitioner said he had lost \$10 and that “if
5 somebody didn’t come up with it, he was going to beat all our ass.” (20 RT 5470.)
6 He also testified that Petitioner was angry that others were in a room with two girls
7 and he was not, and Petitioner kicked a hole in the door. (*Id.* at 5471-72.) The
8 girls came out a few minutes later, Mendoza testified, and looked nervous and
9 scared. (*Id.* at 5473.) The California Supreme Court was not unreasonable in
10 determining that it was a reasonable inference from that evidence that Petitioner
11 used his physical size or strength to frighten and intimidate people.

12 Petitioner also alleges the prosecutor improperly argued that Petitioner had
13 “led a life of brutality and selfishness.” (Pet. at 121 ¶ 280 (citing 25 RT 6799,
14 6809).) The prosecutor argued:

15 And all of these times [after incidents of violence], he’s
16 given all of this chance to rehabilitate himself. Nothing
17 works. Going to state prison doesn’t work. The jail
18 doesn’t work. Nothing works. He keeps on the same
19 pattern. . . . When given every chance by the police, he
20 tried to lie his way out of it instead of facing it, and he’s
21 led a life of brutality and selfishness. That culminated in
22 this trial.

23 (25 RT 6799, 6808-09.)

24 Evidence was presented at trial that Petitioner had committed prior incidents
25 of violence: at age 16, repeatedly striking a juvenile detention officer in response
26 to his instruction to go into the dorm area, breaking a bone and requiring six
27 stitches (24 RT 6496, 6498-99, 6503); kicking and twice hitting a man in the head
28 with an eight inch rock (*id.* at 6529-30, 6540); and hitting a woman in the head
with a tire iron from his pants and telling her to run (*id.* at 6452-53). The
California Supreme Court was not unreasonable in determining that it was a

1 reasonable inference from that evidence that Petitioner had “led a life of brutality,”
 2 or that “selfishness” was a reasonable inference from Petitioner’s behavior with the
 3 girls at his house (20 RT 5471-73) or his attempts to deny his involvement in the
 4 crimes (*see, e.g.*, Pet. Ex. 177 at 00512-36).

5 Finally, Petitioner takes issue with counsel’s failure to object to the
 6 prosecutor’s arguments that Petitioner “lives at home off his father. Doesn’t have a
 7 regular job,” and “works sporadically when he damn well felt like it.” (Pet. at 121
 8 ¶ 281 (citing 25 RT 6784-85, 6802).) Evidence at trial established that Petitioner
 9 lived at the house of his father (21 RT 5742, Pet. Ex. 177 at 00505), who had given
 10 Petitioner and his brother approximately \$50 for the weekend while he was gone,
 11 in addition to the food that was at the house (21 RT 5742). Evidence was also
 12 presented that Petitioner worked “various places” intermittently through
 13 Manpower Temporary Service, working seven days out of a twenty-eight day
 14 period, for one to three days at a time. (*Id.* at 5661-66.) The California Supreme
 15 Court was not unreasonable in determining that the prosecutor’s arguments were
 16 reasonable inferences from that evidence. *See Atcheson*, 94 F.3d at 1244; *cf.*
 17 *Young*, 470 U.S. at 8 n.5. Because counsel could not have been ineffective for
 18 failing to object to such arguments, *Juan H.*, 408 F.3d at 1273, the California
 19 Supreme Court’s denial of this portion of Claim 10(15) was not unreasonable.

20 Claim 10(15) is, therefore, denied.

21 **XXVIII. Claim 10(16)**

22 In Claim 10(16), Petitioner alleges trial counsel was ineffective at the
 23 penalty phase of trial for failing to request appropriate jury instructions and to
 24 object to an inappropriate instruction. (Pet. at 238-40 ¶¶ 641-52, Mot. at 49-50.)

25 **A. Special Instruction No. 1**

26 First, Petitioner alleges trial counsel erroneously failed to object to “Special
 27 Instruction No. 1” regarding the empaneling of an alternate juror between the guilt
 28

1 and penalty phases of trial.¹⁸ (Pet. at 238 ¶ 642 (referring to Claim 11(17)).)

2 Although his Petition refers the Court to his discussion of Claim 11(17) in support,
3 Petitioner seems to intend Claim 11(15)(A), in which he argues that the special

4
5 ¹⁸ The court instructed the jury, in relevant part:

6 “After the guilt phase of this trial is [sic] concluded and the jury returned its verdicts, one
7 of your number was excused for legal cause and replaced with an alternate juror for the penalty
8 phase of the trial. [¶] The alternate juror has been present during all evidence and the reading of
9 all instructions on the law in both phases of the trial. However, the alternate juror did not
10 participate in the jury deliberations and voting which resulted in the verdicts returned as to the
11 guilt and innocence of the defendant of the charge set forth in the information and as to the
12 truthfulness of the special circumstance allegations set out in the information. [¶] For the
13 purposes of this penalty phase of the trial, the alternate juror must accept the verdicts and finding
14 rendered by the jury in the guilt phase of the trial. That is, the alternate juror must accept that the
15 defendant has been proved guilty beyond a reasonable doubt of the charges of murder in the first
16 degree[,] burglary in the first degree and robbery as set forth in the information. [¶] The alternate
17 juror must accept that the special circumstance allegations have been proved to be true beyond a
18 reasonable doubt, namely, that two murders were committed while the defendant was engaged in
19 the commission of burglary and robbery and attempted rape as set forth in the information. [¶]
20 The alternate juror must accept the verdict that the defendant is not guilty of rape as charged in the
21 information. [¶] If you have any lingering doubt concerning the guilt of the defendant as to any
22 of those charges of which he was found guilty or if you have any lingering doubt concerning the
truthfulness of any of the special circumstance allegations which were found to be true, you may
consider that lingering doubt as a mitigating factor or circumstance. [¶] A lingering doubt is
defined as any doubt, however slight, which is not sufficient to create in the minds of the jurors a
reasonable doubt. [¶] The People and the defendant have the right to a verdict on the matter of
penalty which is reached only after a full participation of the 12 jurors who ultimately return the
verdict. [¶] This right may be assured in this phase of the trial only if the alternate juror
participates fully in the deliberations including such review as may be necessary of the evidence
presented in the guilt phase of the trial. [¶] Therefore, the reasonable doubt of guilt and
truthfulness of the charges and special circumstances as to which verdicts have been returned shall
not be reexamined by the jury. [¶] However, for the purpose of determining if there is a lingering
doubt concerning the guilt of the defendant on any charge as to which he has been found guilty or

CONTINUED

23 CONTINUED

24 a lingering doubt as to the untruthfulness of any special allegation which has been found to be
25 true, the jury shall begin its deliberations from the beginning with respect to the evidence
26 presented in the guilt phase of the trial. [¶] You are all instructed to set aside and disregard all
27 past deliberations, if any, concerning whether there is any lingering doubt as to the guilt of the
28 defendant or truthfulness of any special allegation and begin deliberating anew. This means that
each remaining original juror must set aside and disregard any earlier deliberations concerning a
possible lingering doubt as if they had not taken place.” (25 RT 6862-65.)

Trial counsel did not object to the instruction. (*Id.* at 6851; *see also id.* at 6851-53
(explanation of trial court’s reasoning for giving special instruction).)

1 instruction violated his state constitutional and statutory rights and his federal
2 constitutional rights. (Pet. at 246-51 ¶¶ 669-74.)

3 The California Supreme Court considered Petitioner's argument on direct
4 appeal. *Cain*, 10 Cal. 4th at 64-68. It held that the instruction was not improper as
5 a matter of state law. *Id.* The court, on habeas review, could also have reasonably
6 determined that the instruction did not violate Petitioner's federal constitutional
7 rights. *Cf. United States v. Honken*, 541 F.3d 1146, 1166 (8th Cir. 2008) (holding
8 in federal capital trial that "it was not error for the district court to replace a juror
9 with an alternate and instruct the jury to begin penalty phase deliberations anew");
10 *United States v. Johnson*, 223 F.3d 665, 670 (7th Cir. 2000) (affirming conviction
11 and death sentence where alternate juror was substituted at beginning of penalty
12 phase, and noting that it was "[t]rue, the *entire* deliberations did not recommence;
13 but the issues of guilt and of punishment are sufficiently distinct that the alternate
14 didn't have to hear the deliberations on the former issue in order to be able to
15 participate meaningfully in the deliberations on the latter issue. He had sat through
16 the entire trial, which is the important thing"). The court, therefore, could have
17 reasonably determined that counsel was not deficient for not objecting to the
18 instruction at trial. *See Juan H.*, 408 F.3d at 1273; *Molina*, 934 F.2d at 1447. This
19 portion of Claim 10(16) is denied.

20 **B. Instruction on Elements and Defenses for Assault and Battery**

21 Petitioner alleges trial counsel was ineffective for failing to request
22 instructions on the elements of and defenses to the alleged assaults and battery
23 presented in aggravation. On direct appeal, the California Supreme Court
24 considered a related argument that the trial court erred in failing to give the
25 instructions *sua sponte*. The court held:

26 That rule [that there is no duty for a court to instruct on
27 the elements of crimes alleged in aggravation absent a
28 request] is based in part on a recognition that, as a tactical
matter, the defendant may not want the penalty phase

1 instructions overloaded with a series of lengthy
2 instructions on the elements of alleged other crimes
3 because he may fear that such instructions could lead the
4 jury to place undue emphasis on the crimes rather than on
the central question of whether he should live or die. . .

5 .
6 [Those] tactical considerations . . . were potentially
7 present here In argument, the prosecutor devoted
8 little time to the Fontes incident, conceding it was a
9 relatively minor episode: ‘I’m not asking you to say that
10 it’s the strongest aggravating factor. It’s kind of a – it’s a
11 minor deal, but it shows a continuing pattern of
12 violence.’ Defense counsel, although he had called
13 Clayton to present a version of the events more favorable
14 to defendant than Fontes’s, also deemphasized the
15 incident in his summation. Like the prosecutor, he
16 discussed it very briefly, pointing out defendant had not
17 been involved in instigating the fight and had acted only
18 to assist Miller. He also noted a previous jury had
19 assessed only misdemeanor liability on defendant and
20 argued the incident was so minor, it should not ‘have any
21 bearing at all on whether or not Mr. Cain ought to die.’
The record thus supports an inference counsel adopted
the reasonable tactic of treating the Fontes incident as so
minor the jury should not consider it at all in their
decision. Detailed instructions on the possible crimes
committed and legal defenses thereto could have
frustrated this defense approach.

22 *Cain*, 10 Cal. 4th at 72-74 (internal quotation omitted).

23 As the United States Supreme Court held in *Richter*, “[i]n light of the record
24 here there [is] no basis to rule that the state court’s determination was
25 unreasonable.” 131 S. Ct. at 790. This Court would:

26 err[] in dismissing strategic considerations like these as
27 an inaccurate account of counsel’s actual thinking.
28 Although courts may not indulge *post hoc* rationalization
for counsel’s decisionmaking that contradicts the

1 available evidence of counsel's actions, neither may they
 2 insist that counsel confirm every aspect of the strategic
 3 basis for his or her actions. There is a strong
 4 presumption that counsel's attention to certain issues to
 5 the exclusion of others reflects trial tactics rather than
 6 sheer neglect. . . . *Strickland* . . . calls for an inquiry into
 the objective reasonableness of counsel's performance,
 not counsel's subjective state of mind.

7 *Id.* (internal quotations and citations omitted). The California Supreme Court,
 8 therefore, could have reasonably determined that trial counsel's performance in not
 9 requesting jury instructions on the aggravating offenses' elements and defenses
 10 was objectively reasonable. Accordingly, Petitioner is not entitled to federal
 11 habeas relief on this portion of Claim 10(16).

12 **C. Instruction regarding Rape-Related Evidence**

13 Petitioner alleges trial counsel was ineffective for failing to request an
 14 instruction that the jury "not consider any evidence relating to the rape as a factor
 15 justifying imposition of the death penalty." (Pet. at 239 ¶ 643(b).)

16 On direct appeal, the California Supreme Court considered whether the trial
 17 court erred in failing to give such an instruction *sua sponte*. *Cain*, 10 Cal. 4th at
 18 69. Denying that claim, the court emphasized that:

19 [a]s defendant concedes, the evidence relevant to the rape
 20 charge was the same evidence from which the jury had
 21 found Mrs. Galloway's murder was committed during an
 22 attempted rape. The jury was properly instructed to
 23 consider the attempted rape under factor (a). Moreover,
 24 since the jury was instructed under factor (a) to consider
 only the circumstances of crimes 'of which the defendant
 25 was *convicted* in the present proceeding,' there is no
 26 reasonable likelihood they were misled to believe they
 should ignore their own not guilty verdict on the rape
 charge.

27 *Id.* (citations omitted, emphasis in original).

28 The factor (a) instruction told the jury to consider "[t]he circumstances of

1 the crime of which the defendant was convicted in the present proceeding and the
 2 existence of any special circumstance found to be true.” (24 RT 6858.) The
 3 instruction did not explicitly refer to “attempted rape.” The California Supreme
 4 Court could have reasonably determined that counsel was objectively reasonable in
 5 strategically preferring to keep the word “rape” out of the list of factors the jury
 6 should consider and to avoid emphasizing the attempted rape. *See Richter*, 131 S.
 7 Ct. at 790. Moreover, in light of the court’s holding, and defendant’s concession
 8 that the evidence relating to the rape was the same evidence from which the jury
 9 found an attempted rape, the court could have reasonably determined that
 10 Petitioner suffered no prejudice from the absence of such an instruction. In the
 11 alternative, the court could have reasonably reached the same determination it did
 12 for the related claim on direct appeal. Namely, the court could have held that
 13 Petitioner suffered no prejudice from the absence of the instruction because there
 14 was no reasonable probability that the jury considered any evidence relating to the
 15 rape, when it was instructed to consider the circumstances of the crime “of which
 16 the defendant was *convicted* in the present proceeding” and any special
 17 circumstance “found to be *true*.” (25 RT 6858 (emphasis added).)

18 Accordingly, Petitioner is not entitled to federal habeas relief on this portion
 19 of Claim 10(16).

20 **D. Instruction on Intoxication as a Mitigating Factor**

21 Petitioner also alleges trial counsel was ineffective for failing to request an
 22 instruction “elaborating on the relevance of the effect of intoxication as a
 23 mitigating factor, as recognized by Cal. Penal Code § 190.3(h).” (Pet. at 239 ¶
 24 643(c).)

25 The jurors were instructed that they:

26 shall consider[,] take into account and be guided by . . . ,
 27 if applicable . . . [w]hether or not at the time of the
 28 offense the capacity of the defendant to appreciate the
 criminality of his conduct or to conform his conduct to

1 the requirements of the law was impaired as a result of .
 2 . . the effects of intoxication.

3 (25 RT 6858-59.)

4 Petitioner fails to specify what sort of instruction trial counsel should have
 5 requested to elaborate on the given instruction, or how the failure to do so falls
 6 below prevailing professional norms. *See* L.R. 83-17.7(g) (2003) (“Any request
 7 for evidentiary hearing . . . shall include a specification of the factual issues and the
 8 legal reasoning that require a hearing and a summary of the evidence of each claim
 9 the movant proposes to offer at the hearing”). Petitioner’s conclusory allegation
 10 fails to demonstrate that counsel’s performance was objectively unreasonable. *See*
 11 *Jones*, 66 F.3d at 205; *James*, 24 F.3d at 26. To be entitled to federal habeas relief,
 12 Petitioner must show that the state court would have been unreasonable in
 13 determining that trial counsel’s performance was objectively reasonable and that
 14 Petitioner did not suffer any prejudice. *See Richter*, 131 S. Ct. at 784. Petitioner
 15 has not done so. Accordingly, this portion of Claim 10(16) is denied.

16 **E. Instruction regarding “Double-Counting”**

17 Petitioner further alleges trial counsel was ineffective for failing to request
 18 an instruction “pursuant to *People v. Melton*, advising the jury not to double-count
 19 the element of ‘circumstances of the crime’ which were also ‘special
 20 circumstances.’” (Pet. at 239 ¶ 643(d) (citation omitted).) Petitioner alleges that
 21 such an instruction would have “substantially reduced the aggregate ‘weight’ of the
 22 aggravating factors.” (*Id.* ¶ 644(b).)

23 The California Supreme Court rejected this claim on direct appeal. The
 24 court held that, “[c]ontrary to defendant’s claim, counsel did not render ineffective
 25 assistance by failing to request” an instruction that the jury not “‘double count’ the
 26 same facts as circumstances of the crime and as special circumstances. (*See People*
 27 *v. Melton* (1988) 44 Cal. 3d 713, 768 (noting ‘theoretical’ problem of double
 28 counting but finding ‘possibility of actual prejudice . . . remote’).)” *Cain*, 10 Cal.

1 4th at 68. The court reasoned that “[s]ince the instruction given was not
 2 reasonably likely to have been understood as inviting the jurors to ‘weigh’ each
 3 special circumstance twice, it was neither deficient performance on counsel’s part,
 4 nor prejudicial to defendant’s case, to forego a special instruction.” *Id.* at 68 n.24
 5 (citation omitted).

6 The court’s denial of this claim was not an unreasonable application of
 7 Supreme Court precedent. The Supreme Court has held that the effect “that the
 8 jury would count the nature of the crime twice if it were instructed to consider both
 9 the facts of the crime and the eligibility [or special] circumstances . . . cannot fairly
 10 be regarded as a constitutional defect in the sentencing process.” *Brown v.*
 11 *Sanders*, 546 U.S. 212, 222 n.8 (2006) (discussing *Zant v. Stephens*, 462 U.S. 862,
 12 894 (1983)) (internal quotations omitted). The Supreme Court confirmed in
 13 *Sanders* that such an instruction under California Penal Code § 190.3(a) does not
 14 unconstitutionally lead the jury to give greater weight to the facts underlying the
 15 special circumstances. *Id.* The California Supreme Court could have reasonably
 16 determined that Petitioner could not have been prejudiced, as a matter of law, by
 17 counsel’s failure to request an instruction to the contrary. *See Fretwell*, 506 U.S. at
 18 370 (“[A]s a matter of law, counsel’s conduct . . . cannot establish the prejudice
 19 required for relief under the second strand of the *Strickland* inquiry . . . [where
 20 petitioner] was deprived of neither a fair trial nor any of the specific constitutional
 21 rights designed to guarantee a fair trial” (internal quotation omitted)).

22 Accordingly, this portion of Claim 10(16) is denied.

23 **F. Instruction on Lack of Premeditation as a Mitigating Factor**

24 Finally, Petitioner alleges that trial counsel was ineffective for failing to
 25 request an instruction on “the effect of the mitigating factor of the lack of
 26 premeditation.” (Pet. at 239 ¶ 643(e).)

27 The jurors were instructed that they “shall consider all of the evidence which
 28 has been received during any part of the trial . . . [,] [t]he circumstances of the crime

1 . . . [, and] [a]ny other circumstance which lessens the gravity of the crime, even
 2 though it is not a legal excuse for the crime” (25 RT 6858-60.) The
 3 California Supreme Court may have reasonably held that those circumstances
 4 would include any lack of premeditation the jurors saw in the evidence. The jurors
 5 were also instructed that they “may reject death if the evidence arouses sympathy,
 6 mercy or compassion” and that they “are free to assign whatever moral or
 7 sympathetic value [they] deem appropriate to each and all of the various factors
 8 [they] are permitted to consider.” (*Id.* at 6860, 6867.)

9 Here, too, Petitioner fails to specify what sort of instruction trial counsel
 10 should have requested regarding premeditation as a mitigating factor. Petitioner’s
 11 conclusory allegation fails to demonstrate that counsel’s performance was
 12 objectively unreasonable. *See* L.R. 83-17.7(g) (2003); *Jones*, 66 F.3d at 205;
 13 *James*, 24 F.3d at 26. To be entitled to federal habeas relief, Petitioner must show
 14 that the state court would have been unreasonable in determining that trial
 15 counsel’s performance was objectively reasonable and that Petitioner did not suffer
 16 any prejudice. *See Richter*, 131 S. Ct. at 784. Because Petitioner has not done so,
 17 this portion of Claim 10(16) is denied.

18 //

19 **XXIX. Claim 13**

20 In Claim 13, Petitioner alleges that he was denied his constitutional right to
 21 the effective assistance of a mental health expert in the preparation and
 22 presentation of his defense. (Pet. at 268 ¶ 712 (citing, *inter alia*, *Ake v. Oklahoma*,
 23 470 U.S. 68, 74 (1985)); Mot. at 65-67.) Petitioner contends that he was
 24 prejudiced by the failure of a competent mental health expert to discover his
 25 incompetence to waive constitutional rights before giving a statement to police, his
 26 susceptibility to duress and coercive police tactics, his mental state defenses, and
 27 mitigating mental health evidence. (*Id.* at 268-69 ¶ 715.) Petitioner does not
 28 allege that the state denied him access to a mental health expert. Rather, he alleges

1 that the expert that was provided, Dr. Donaldson, “failed to identify the numerous
2 available mental health issues, and operated under a conflict of interest that
3 destroyed his competency.” (*Id.* at 268 ¶ 714.)

4 In *Ake*, the Supreme Court held that “when a defendant has made a
5 preliminary showing that his sanity at the time of the offense is likely to be a
6 significant factor at trial, the Constitution requires that a State provide access to a
7 psychiatrist’s assistance on this issue if the defendant cannot otherwise afford
8 one.” 470 U.S. at 74. The Court reached “a similar conclusion in the context of a
9 capital sentencing proceeding, when the State presents psychiatric evidence of the
10 defendant’s future dangerousness.” *Id.* at 83. “[T]he State must, at a minimum,
11 assure the defendant access to a competent psychiatrist who will conduct an
12 appropriate examination and assist in evaluation, preparation, and presentation of
13 the defense.” *Id.*

14 To establish a constitutional violation, Petitioner must, therefore,
15 demonstrate that the state denied him *access* to a competent psychiatrist and
16 appropriate examination and assistance. *Harris v. Vasquez*, 949 F.2d 1497, 1516
17 (9th Cir. 1991). In *Harris*, the Ninth Circuit found no constitutional violation
18 “because the state did in fact provide Harris with psychiatric assistance. The state
19 provided Harris with *access* to any competent psychiatrist of his choice when it
20 gave Harris the funds to hire two psychiatrists from the general psychiatric
21 community. The state did not limit Harris’s access to psychiatric assistance in any
22 way.” 949 F.2d at 1516 (emphasis in original).

23 The California Supreme Court could have reasonably concluded here, as the
24 Circuit did in *Harris*, that the state provided Petitioner with funds to retain
25 psychiatric assistance from the general psychiatric community. Petitioner has
26 made no allegations to the contrary. Accordingly, Petitioner is not entitled to
27 federal habeas relief on Claim 13.

28 **XXX. Claims 2(18), 8(3)(A), 10(17), 10(18) and 18**

1 Petitioner moves for an evidentiary hearing on Claims 2(18), 10(17), 10(18),
2 and 18, alleging varieties of cumulative error as to the guilt phase, penalty phase,
3 and entire trial, and abandonment of counsel in the penalty phase. (Mot. at 50-52,
4 76-77, 93.) Petitioner also moves for an evidentiary hearing on Claim 8(3)(A),
5 alleging that the imposition of the death penalty is cruel and unusual punishment
6 because it is disproportionate to his role in the crimes. (Pet. at 207 ¶¶ 539-542,
7 Mot. at 90-91.)

8 In Claim 2(18), Petitioner alleges that “[e]ven if each individual incident of
9 counsel’s ineffectiveness does not require relief on its own, the cumulative impact
10 of these errors rendered Mr. Cain’s counsel so ineffective that it tainted the entire
11 guilt phase and mandates relief from that verdict.” (Pet. at 182 ¶ 479.)

12 In Claim 10(17), Petitioner alleges that “[e]ven if each individual incident of
13 counsel’s ineffectiveness is not independently sufficient to require relief from the
14 death penalty, the cumulative impact of these errors rendered Mr. Cain’s counsel
15 so ineffective that it tainted the entire penalty phase and mandates relief from that
16 verdict.” (*Id.* at 240 ¶ 646.)

17 In Claim 10(18), Petitioner alleges that “[t]he extensive failures of defense
18 counsel during the penalty phase of Mr. Cain’s trial, especially in light of the
19 similar extensive failures during the pre-trial and guilt phases, go beyond mere
20 ineffectiveness, and rise to the level of actual abandonment by counsel.” (*Id.* at
21 240 ¶ 647.)

22 In Claim 18, Petitioner alleges that the cumulative effect of “the totality of
23 errors, by their number and importance, . . . [produced] a trial that was so
24 fundamentally unfair, involving as it did numerous constitutional violations, that
25 setting aside the guilt and penalty phase verdicts is required.” (*Id.* at 299 ¶ 806.)

26 In Claim 8(3)(A), Petitioner alleges that it is disproportionate to sentence
27 Petitioner to death when “[t]here was significant evidence presented at trial, and
28 even further evidence that was either not presented due to the ineffectiveness of

1 [counsel] or due to the fact that it was not investigated and/or was suppressed by
 2 the prosecution indicating that persons other than Mr. Cain were responsible for
 3 the crimes.” (*Id.* at 207 ¶ 540.)

4 In support of each of these claims, Petitioner seeks to present “all the
 5 evidence” identified in his Motion in support of his guilt- and/or penalty-phase
 6 claims, along with the testimony of a *Strickland* expert (apart from Claim 8(3)(A))
 7 and trial counsel.

8 All claims of ineffective assistance included in Petitioner’s Motion for
 9 which the Court found the adequacy of counsel’s performance to be unresolved
 10 have been included within the scope of the evidentiary hearing. To the limited
 11 extent that the alleged facts supporting Petitioner’s cumulative error and
 12 abandonment of counsel claims will be heard through those underlying claims,
 13 Petitioner’s request for evidentiary hearing on Claims 2(18), 8(3)(A), 10(17),
 14 10(18), and 18 is granted. Likewise, all unresolved claims of prosecutorial
 15 misconduct have been included within the scope of the evidentiary hearing. The
 16 alleged facts supporting those claims will also be heard in support of Claim
 17 8(3)(A).

18 //

19 **XXXI. Order**

20 For the foregoing reasons, the Court hereby orders as follows:

21 1. Petitioner’s Motion for an Evidentiary Hearing is **GRANTED IN**
 22 **PART**. The Court will hold an evidentiary hearing on:

- 23 a. Claims 1(2) and Claim 2(11) as to hair comparison evidence;
- 24 b. Claims 2(1), 10(6), 10(9), 10(10), 10(11), 10(13), and 10(14) as
 25 to whether counsel obtained adequate mental health expert assistance and
 26 adequately investigated and presented petitioner’s background, employment
 27 history, and mental impairments;
- 28 c. Claims 2(12), 10(6), 10(9), and 10(13) as to Mendoza’s alleged

1 attempts to create an alibi;

2 d. Claims 1(1), 2(12), 10(6), 10(9), and 10(13) as to Mendoza's
3 alleged criminal history;

4 e. Claim 1(2) as to District Attorney Investigator David Stone and
5 Detective Billy Tatum;

6 f. Claims 2(12), 2(17), and 10(13) as to witnesses Tammy and
7 Jennifer O'Neil; and

8 g. Claims 2(18), 8(3)(A), 10(17), 10(18), and 18, to the limited
9 extent that the alleged facts supporting those Claims will be heard through
10 underlying Claims identified above.

11 2. In all other respects, the motion is **DENIED**. Petitioner's request for
12 an evidentiary hearing on Claim 8(4) is denied without prejudice.

13 3. Claims 1(3), 2(2), 2(7), 2(13), 3(1), 10(1), 10(2), 10(3), 10(5), 10(7),
14 10(8), 10(12), 10(15), 10(16), 11(11), and 13, and portions of Claims 1(2), 2(1),
15 2(11), 2(12), 2(14), 2(17), 10(6), 10(9), and 10(13) are **DENIED**.

16 4. No later than April 8, 2011, the parties shall file a joint report
17 providing:

- 18 a. proposed briefing schedules for any motions *in limine*;
19 b. an estimate of the number of hours needed by Petitioner and by
20 Respondent for the presentation of evidence at the hearing; and
21 c. an estimate of the date by which the parties will be prepared for
22 the evidentiary hearing and two suggested dates for the commencement of the
23 hearing.

24 **IT IS SO ORDERED.**

25 Dated: March 14, 2011.

26 

27 AUDREY B. COLLINS
28 United States District Judge